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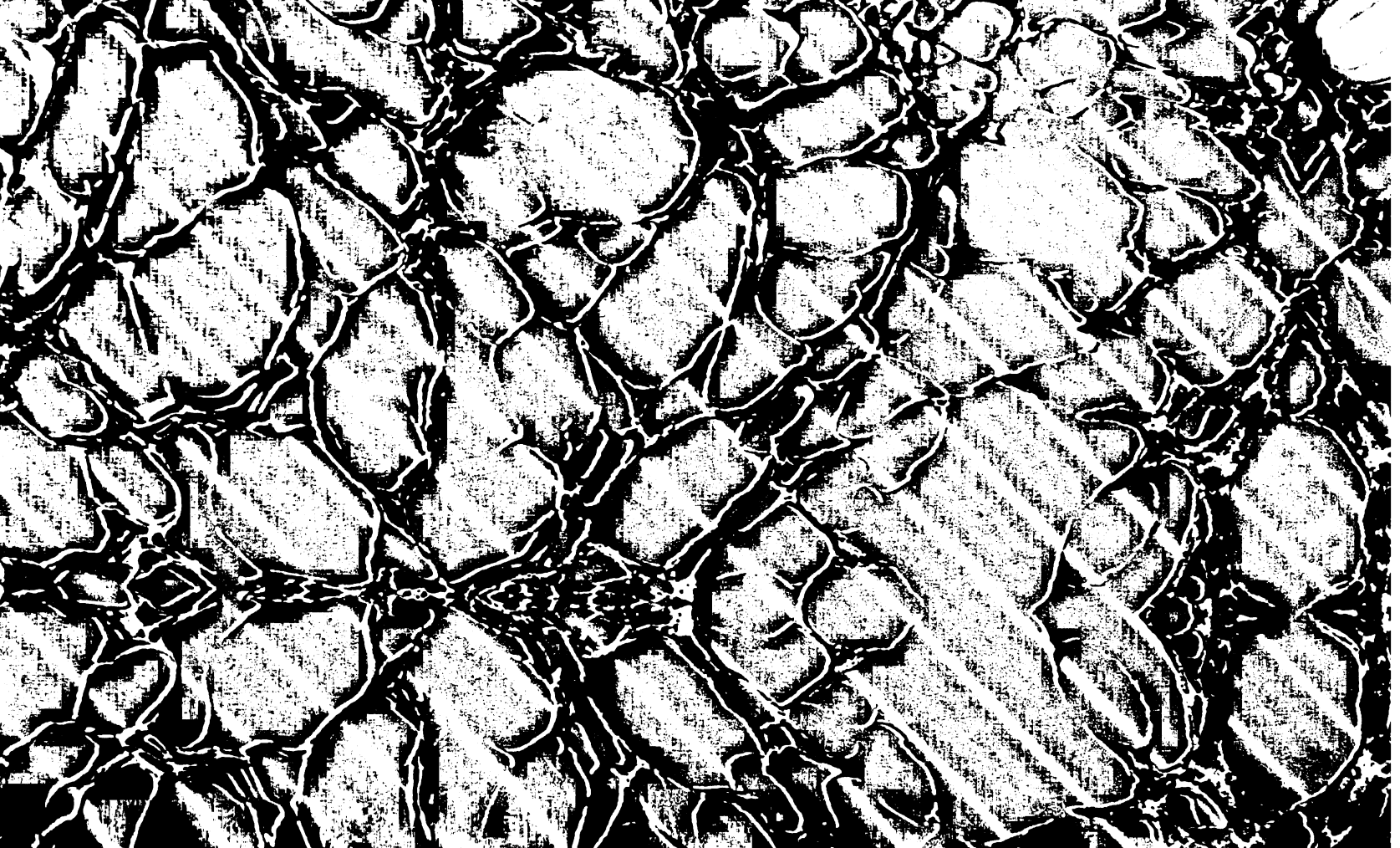

A

DIGEST

OF THE

Laws of England

RESPECTING

REAL PROPERTY.

By WILLIAM CRUISE,

OF LINCOLN'S INN, ESQ. BARRISTER AT LAW.

VOLUME THE FOURTH.

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A

DIGEST

OF THE

Laws of England

RESPECTING

REAL PROPERTY.

TITLE XXXII.

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CHAP. I.

Of the Origin and Nature of Deeds.

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8. *Statute of Quia Emptores.*
12. *Fines for Alienation.*
16. *Different Kinds of Aſſurances.*
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Section 1.

Alienation of Lands.

IT is admitted by all our legal writers that an unlimited power of alienation exiſted in *England* in the time of the *Saxons*, but upon the ſettlement of the *Normans*, and the eſtabliſhment of the feudal law, all landed property became unalienable; and during

Wright's Ten. 154.

ing the reign of *William* the Conqueror, and that of his ſons, the doctrine of nonalienation was, for various reaſons, ſtrictly enforced. The greater part of the landed property of the kingdom had been diſtributed among the *Norman* barons, as ſtrict and pure feuds, upon condition of military ſervice; and as a conſiderable jealouſy prevailed againſt all thoſe who were of *Saxon* origin, leſt they ſhould attempt to reinſtate themſelves in their ancient poſſeſſions, great care was taken during that period, that all the vaſſals of the crown, who could alone be depended on, in caſe of any inſurrection, ſhould be in a ſituation to perform their military ſervices.

§ 2. The firſt ſtep towards a liberty of alienation was that by which the tenant was permitted to alien with the conſent of his lord. This rule was adopted from the maxims which then prevailed on the Continent, and gave riſe to fines for alienation. But in *England* the tenant could not diſpoſe of his land, even with the conſent of his lord, unleſs he had alſo obtained the conſent of his next heir; and therefore it was very uſual, in ancient feoffments to expreſs that the alienation was made with the conſent of the feoffor's heir, and ſometimes for the heir to join in the feoffment.

Glanv. lib. 7. c. 1. Wright 167. Madox Form. N° 316.

§ 3. The power of alienation was further extended by a law of *Hen.* 1. c. 70. which allowed a man to diſpoſe of lands purchaſed by himſelf.—*Emptiones vero, vel deinceps acquiſitiones ſuas det cui magis velit;*

Wilkins 266.

ſi

ſi Bocland habeat, quam ei parentes ſui dederunt, non mittat eum extra cognationem ſuam.

§ 4. *Glanville* has given us a very circumſtantial account of the law, as it ſtood in the reign of *Hen.* 2. reſpecting alienation, from which it appears that the power of diſpoſing of lands was then conſiderably enlarged; and a right of alienation ſeems to have been ſoon after extended to all lands which a perſon had himſelf acquired, provided they had been conveyed to him and his aſſigns; and alſo to one-fourth of all lands acquired by deſcent, without the conſent of the heir. Lib. 7. c. 1. Horne Mir. 11.

§ 5. This extenſive power of alienation produced a grievance which was much complained of in thoſe days; the king's greater barons who had a large extent of territory, held under the crown, had frequently granted out ſmaller manors, to inferior perſons, to be held of themſelves. In imitation whereof, thoſe inferior lords began to carve out and grant to others ſtill more minute eſtates, to be held of themſelves; and were ſo proceeding downwards *in infinitum*, till the ſuperior lords obſerved that by this method of ſub-infeudation, they loſt all their feudal profits, their wardſhips, marriages, eſcheats, *&c.* which fell into the hands of theſe meſne or middle lords. Beſides, the meſne lords were by this means leſs able to perform their military ſervices.

§ 6. This cauſed an article to be inſerted in the *Magna Charta* of *Hen.* 3. c. 32. by which the ſub-

infeudation of part of the land was prohibited, unleſs ſufficient was left to anſwer the ſervices due to the ſuperior lord.—*Nullus liber homo det de cetero amplius alicui, vel vendat alicui de terra ſua, quam ut de reſiduo terræ ſuæ poſſit ſufficienter fieri domino feodi ſervitium ei debitum, quod pertinet ad feodum illud.*

Ten. 158. § 7. Sir *Martin Wright* obſerves that the words *de cetero* in this ſtatute, do not ſuppoſe that the tenant might before have lawfully aliened or given the whole of his land to hold of himſelf, becauſe then this chapter, prohibiting it for the future would have been a reſtraint upon the tenant's liberty at common law. But they plainly ſuppoſe ſuch gifts or alienations to have been unlawful, which are therefore reſtrained merely in confirmation of the common law.

Statute of Quia Emptores. § 8. Hitherto the right of alienation was confined to ſubinfeudations conformably to the principles of the feudal law. But in 18 *Edw.* 1. an act was made called the ſtatute of *Quia Emptores Terrarum*, which, reciting the inconvenience of feoffments, to hold of the feoffors and not of the ſuperior lords, enacted—*Quod de cetero liceat unicuique libero homini terras ſuas ſeu tenementa ſua, ſeu partem inde ad voluntatem ſuam vendere. Ita tamen quod feoffatus teneat terram illam ſeu tenementum illud, de capitali domino feodi illius, per eadem ſervitia et conſuetudines, per quæ, feoffator ſuus illa prius tenuit.*

Wright 161. § 9. This ſtatute took from the tenants of common lords the feodal liberty they claimed of diſpoſing of part

part of their lands to hold of themſelves, and inſtead of it, gave them a general liberty to ſell all or any part, to hold of the next immediate lord; for that is the ſenſe of the words *de capitali domino*, which they could not have done before, without the conſent of the lord. 2 Inſt. 501.

§ 10. Neither *Magna Charta* nor the ſtatute of *Quia Emptores*, extended to the King's immediate tenants; who ſeem to have been ſo ſtrictly reſtrained from alienation, that they were not permitted to diſpoſe of their lands, even to their eldeſt ſons.

§ 11. Thus it appears from the Rolls of Parliament that in 18 *Edw.* 1. *Gilbert de Humfravill* petitioned the king for licence to enfeoff his eldeſt ſon and his wife of the manor of *Overton*, to hold of the ſaid *Gilbert* during his life, and, after his death, of the chief lord by the uſual ſervices. To which the king anſwered—*Rex non vult aliquem medium, et ideo non nceſſit.* Vol. 1. 54. N° 101.

§ 12. This reſtraint upon the king's immediate tenants is ſuppoſed to have been indirectly removed by the ſtatute *De Prerogativa Regis*, 17 *Edw.* 2. c. 6. But the king's conſent being neceſſary to every alienation of his tenants *in capite*, it became a queſtion whether if ſuch tenant aliened without licence, the land ſo aliened was not forfeited, or whether the king ſhould only ſeiſe it by way of diſtreſs, until a fine ſhould be paid for the contempt; but this queſtion was ſettled by the ſtatute 1 *Edw.* 3. c. 12. by which Fines for Alienation. Wright 165

it was enacted, that in all cases of alienations by tenants *in capite*, the king should not hold the land as forfeited, but should have a reasonable fine in the Chancery, to be levied by due process.

Wright 166. § 13. It remained much longer a question whether the king's tenants might have aliened any part of their lands, to hold of themselves, as the tenants of common lords might before the statute *Quia Emptores*: But such alienations, made by tenants who held of *Hen.* 3. or other kings before him, were at length made good by the statute 34 *Edw.* 3. c. 15. saving to the king his prerogative of the time of his grandfather, father, and of his own time.

Wright 167. § 14. It is extremely doubtful what prerogative is here saved to the crown; but it is perfectly clear that fines for alienation were established by the statute
2 Inst. 67. 1 *Edw.* 3. and after this act Lord *Coke* says, writs of *quo titulo ingressus est* issued from the office of the Remembrancer of the Exchequer, to help the king to his reasonable fine; whereupon the feoffee was driven to plead, to his great charge and trouble; and therefore, upon conference with the king's officers and the judges, it was ordained that, seeing the king's tenant could not alien without licence, for if he did he should pay a fine; that for a licence to be obtained, the king should have a third part of the value of the land, which was holden reasonable. And if the alienation was without licence, then a reasonable fine by the statute was to be paid by the alienee, which they resolved to be one year's value.

§ 15. Thus

§ 15. Thus continued the law until the abolition of military tenures by the ſtatute 12 *Cha.* 2. c. 24. which converted all the ancient tenures into free and common ſocage; and took away all fines for alienation, ſeizures, and pardons for alienation, and all incidents thereto; ſaving fines for alienation due by particular cuſtom of particular manors, other than fines for alienation of lands and tenements holden immediately of the king *in capite*. § 1. § 6.

§ 16. With reſpect to the different modes of alienation, or rather the legal evidences of the tranſfer of real property, they are called the common aſſurances of the realm, whereby every man's eſtate is aſſured to him, and all controverſies, doubts, and difficulties, are either prevented or removed. Different Kinds of Aſſurances. 2 Comm. 294.

§ 17. There are four kinds of common aſſurances by which lands may be aliened. 1° Deeds or matters in *pais*, which are aſſurances tranſacted between two or more private perſons in *pais*; in the country, that is, (according to the old common law) upon the very ſpot or piece of land to be transferred. 2° Matters of record or aſſurances tranſacted only in the king's public courts of record. 3° Aſſurances deriving their effect from ſpecial cuſtom, obtaining in ſome particular places and relating only to ſome particular ſpecies of property. 4° A deviſe contained in a perſon's laſt will and teſtament; which does not take effect until after his death.

§ 18. A deed

Of a Deed or Charter. 1 Inſt. 35 *b.*

§ 18. A deed is a writing on parchment or paper, ſealed and delivered, to prove and teſtify the agreement of the parties, whoſe deed it is, to the things therein contained. It is ſometimes called a charter, *charta*, from its materials, but moſt uſually, when applied to the tranſactions of private perſons, it is called a deed, in Latin *factum*, becauſe it is the moſt ſolemn and authentic act that a man can perform, in the diſpoſal of his property.

§ 19. It is probable that every alienation was very ſoon accompanied with ſome written evidence, though in the time of the *Saxons* a legal transfer might be made of lands by certain ceremonies, without any charter or writing. Thus, *Ingulphus*, in his hiſtory of the abbey of *Croyland*, ſays,—" *Conferebantur* " *multa prædia nudo verbo, abſque ſcripto vel charta,* " *tantum cum domini gladio, galea, vel cornu, vel* " *cratera, et plurima tenementa cum calcari, cum ſtrigili,* " *cum arcu, et nonulla cum ſagitta.*"

Mad. Form. Pref.

§ 20. Deeds or charters were notwithſtanding in uſe at this time: theſe were generally called *gewrite* or writings, and the particular deed by which a free eſtate might be conveyed was called *landboc*, *libellus de terra*, a donation or grant of land, and the land thus granted was called bockland.

Mad. Form. 283.

§ 21. Upon the introduction of the *Norman* cuſtoms, the ſolemn and public delivery of the poſſeſſion, in imitation of the feudal inveſtiture, became eſſentially

tially neceſſary to the transfer of land; and was alone ſufficient for that purpoſe. But as written charters conſtituted a much better ſpecies of evidence of the agreement of the parties, a charter or deed, in imitation of the *Breve Teſtatum* of the feudal law, was uſually prepared, and executed: and was delivered to the purchaſer at the ſame time with the land.

§ 22. The increaſe of commerce and wealth having introduced a greater degree of refinement in manners, agreements and conveyances became more complex, which produced an univerſal practice of reducing them into writing. But ſtill lands might have been tranſferred by a verbal contract only, provided it was attended with a ſolemn and public delivery of the poſſeſſion, until the latter end of the reign of *Cha.* 2.

§ 23. Deeds are divided into two ſorts, deeds poll, and deeds indented. A deed poll is not ſtrictly ſpeaking an agreement between two perſons; but a declaration of ſome one particular perſon. Thus a feoffment from *A.* to *B.* by deed poll, is not an agreement between *A.* and *B.*, but rather a declaration by *A.* addreſſed to all mankind, informing them that he thereby enfeoffs *B.* of certain lands therein mentioned. It was formerly called *charta de una parte*, and uſually begins thus—*Sciant præſentes et futuri quod ego A. &c. &c.*—Know all men by theſe preſents that *I. A.* have granted and enfeoffed, *&c. &c.*

Deed Poll.

Lit. ſ. 370.

§ 24. An indenture is a mutual agreement between two or more perſons, whereof each party has a copy. Formerly,

Indenture. Lit. ſ. 370. 1. 2. 1 Inſt. 220 *a.* n. 1.

Formerly, when deeds were more conciſe than they are at preſent, it was uſual to write both parts on the ſame ſkin of parchment, with ſome words or letters of the alphabet written between them, through which the parchment was cut in acute angles, *inſtar dentium*, from which they acquired the name of indentures or deeds indented, in ſuch a manner as to leave half the word on one part, and half on the other.

§ 25. In the caſe of an indenture there ought regularly to be as many copies of it, as there are parties, and when the ſeveral parts are interchangeably executed by the ſeveral parties, that part or copy which is executed by the grantor is uſually called the original, and the reſt are counter-parts: though of late it is moſt frequent for all the parties to execute every part, which renders them all originals. But a counter-part of a deed has been admitted to be ſufficient evidence of ſuch deed; and a conveyance decreed accordingly.

Eyton v. Eyton. Prec. in Cha. 116.

Of an Article or Agreement.

§ 26. It is a common practice for perſons to enter into an article or agreement preparatory to the execution of a formal deed, whereby it is ſtipulated that one of the parties ſhall convey to the other, certain lands or hereditaments, or releaſe his right to them, or execute ſome other deed reſpecting them.

§ 27. An article is therefore conſidered as a memorandum or minute of an agreement to make ſome future diſpoſition or modification of real property.

TITLE

TITLE XXXII.

DEED.

CHAP. II.

Of the Circumſtances neceſſary to a Deed.

§ 2. *Sufficient Parties.*
4. *Who may convey by Deed.*
5. *The King and Queen.*
7. *Corporations.*
8. *Of Deeds by Infants.*
12. *Marriage Contracts by Female Infants.*
16. *By Male Infants.*
18. *Infant Truſtees may convey.*
19. *Idiots and Lunaticks.*
22. *Married Women.*
27. *Perſons attainted.*
§ 28. *Who may be Grantees.*
32. *Conveyances to Charitable Uſes.*
35. *Conſideration.*
41. *Writing on Parchment or Paper.*
45. *Stamps.*
46. *Reading.*
47. *Sealing and Signing.*
49. *Delivery.*
60. *Atteſtation.*

Section 1.

WHEN it became uſual to reduce all agreements into writing, the following circumſtances were deemed neceſſary to a deed. 1° Sufficient parties, and a proper ſubject matter. 2° A good and ſufficient conſideration. 3° Writing on paper or parchment duly ſtamped. 4° Words ſufficient to ſpecify the agreement, and bind the parties, legally and orderly ſet forth. 5° Reading if deſired. 6° Sealing and ſigning. 7° Delivery. 8° Atteſtation by witneſſes.

§ 2. The firſt requiſite to a valid deed is, that there be perſons able to contract, and be contracted with, for the purpoſes intended by the deed; and alſo

Sufficient Parties.

alſo a thing or ſubject matter to be contracted for. So that in every deed there muſt neceſſarily be a grantor, a grantee, and a thing granted.

§ 3. All thoſe who have any eſtate, right, title, or intereſt, either at law, or in equity, in that which is the ſubject matter of a deed, muſt neceſſarily be parties to it, otherwiſe their eſtate or intereſt will remain in them; and all thoſe who are intended to take an immediate eſtate or intereſt under a deed, muſt alſo be parties to it: but a perſon may take an eſtate in remainder by a deed to which he is not a party.

1 Inſt. 231 *a*.

Who may convey by Deed.

§ 4. With reſpect to the perſons who are capable of conveying, it may be laid down as a general rule that all thoſe who have attained the age of twenty-one years, and are of ſound mind and underſtanding, and not under the power of others, may be parties to and bind themſelves by deed.

The King and Queen.

§ 5. The king had formerly a power of alienating the crown lands for ever. But this prerogative has been reſtrained by ſeveral modern ſtatutes of which an account will be given hereafter.

Tit. 34.

1 Inſt. 3 *a*.

§ 6. The queen conſort is conſidered by the common law as a feme ſole, and may therefore be a party to any ſpecies of deed, without the king.

Corporations.

§ 7. Although a corporation aggregate is ſaid to be inviſible, immortal, and to exiſt only in ſuppoſition of

of law, yet ſuch an artificial body is capable, by its creation, of being party to a deed, and in many caſes of acquiring or conveying away real property by deed. A corporation ſole, as a biſhop or parſon, may alſo be a party to a deed. But a dean without his chapter, a mayor without his commonalty, or the maſter of a college without his fellows, cannot by executing a deed, bind the corporation.

Of Deeds by Infants.

§ 8. All contracts or agreements made by an infant, from which no apparent benefit can ariſe to him, are abſolutely void. But as to thoſe contracts from which the infant may derive ſome benefit, and which are entered into with more ſolemnity, they are only voidable, that is, the law allows the infant when he comes of age, either to ratify and confirm, or elſe to void them.

3 Mod. 310.

§ 9. Whatever an infant is bound and compellable to do at law, the ſame ſhall bind him although he does it without a ſuit. And therefore where an infant conveyed lands which had been mortgaged to his father (the mortgage money having been paid off) to a new mortgagee, it was held to be good.

Zouch v. Parſons, 3 Burr. 1794.

§ 10. *John Bicknell* conveyed the lands in queſtion to *William Cooke* and his heirs by way of mortgage. *W. Cooke* afterwards died leaving *J. L. Cooke* an infant, his heir and his widow joint executors. The mortgage money was paid off, and the infant and his mother conveyed the mortgaged premiſes to a new mortgagee. It was reſolved that the infant was bound by

by this conveyance, becauſe it could never operate to his prejudice, and that he was compellable to convey.

§ 11. By the ſtatute 17 *Geo.* 3. c. 26. § 6. It is enacted, that all contracts for the purchaſe of any annuity with an infant ſhall be utterly void, any attempt to confirm the ſame, after ſuch perſon ſhall have attained the age of twenty-one years, notwithſtanding.

Marriage Contracts by Female Infants.

§ 12. Contracts entered into by female infants in conſideration of marriage are more favoured than any others; a female being capable of contracting marriage long before the age of twenty-one, ſhe ought to be permitted to bind herſelf by the other parts of the contract: for as ſoon as the marriage is had, the principal contract is executed, and cannot be ſet aſide; the eſtate and capacities of the parties are altered, the children born of the marriage become intereſted: and therefore it has been truly ſaid that marriage contracts ought not to be reſcinded, becauſe the intereſts of third perſons would be affected.

Cannell v. Buckle, 2 P. Wms. 243.

§ 13. Lord *Macclesfield* has ſaid, that if a female infant on a marriage, with the conſent of her guardians, ſhould covenant in conſideration of a ſettlement to convey her inheritance to her huſband. If this were done in conſideration of a competent ſettlement, equity would execute the agreement, although no action would lie at law to recover damages.

Lord

Lord *Hardwicke*, after citing this paſſage, ſays— "This is going a great way, as it related to the inheritance of the wife, but yet there are caſes where "the court will do it, as if the lands of the wife "were no more than an adequate conſideration for "the ſettlement that the huſband makes, and after "the marriage the wife ſhould die, and leave iſſue, "who would be entitled to portions, provided for "them by the ſettlement; it would in that caſe be "very reaſonable to affirm that ſettlement." Harvey v. Aſhley, 3 Atk. 615.

§ 14. This doctrine has been denied by Lord *Thurlow*; who, in a caſe where a bill was filed for a ſpecific execution of articles, entered into by a female infant, reſpecting her real eſtate, previous to and in conſideration of her marriage, ſaid—"To decree a "ſpecific performance of the articles, the court muſt "carry the principle to this length, that a wife making "a wife ſettlement in her infancy, on the marriage, "without any eſtate ſettled on the other ſide, is "bound by the agreement; and that even if the "huſband had died, ſhe muſt have been bound. I "cannot think an infant only covenanting as to her "eſtate can be bound. If ſhe is ſo at all, it muſt be "in reference to her marriage. No body has yet "ſaid that merely by its being upon marriage, ſhe is "bound; but it is ſaid that upon a competent ſettle-"ment ſhe would be bound. I think the court "ſhould not go into the competence of the ſettlement. "I muſt lay down that every ſettlement ſhall be con-"ſidered as good, till ſhewn to be fraudulent. The "caſes have not gone ſo far, nor does my opinion. Durnford v. Lane, 1 Bro. R. 106.

" If ſhe had a ſettlement from her huſband, and after " his death ſhe had had taken poſſeſſion of it, I think " ſhe would be bound by the equity ariſing from her " own act. I ſay this, in deference to *Cannell* v. " *Buckle*, and *Harvey* v. *Aſhley*. I think ſhe is not " bound, unleſs ſhe has availed herſelf of the ſettle- " ment of the huſband. In this opinion I cannot ſay " the whole property is bound, or decree the articles " to be ſpecifically performed."

Ante f. 13.

§ 15. Lord *Thurlow* fully confirmed this opinion by his decree on a ſubſequent caſe.

Clough v. Clough, 3 Woodeſon, 453. note. 4 Bro. R. 510.

A bill was brought on behalf of the infant children of the marriage, after the huſband's death, againſt his widow, praying that marriage articles might be eſtabliſhed, and ſpecifically performed, entered into before marriage, by *Patty Clough* the widow, while an infant, and her guardian, for ſettling her eſtate, and lands of the huſband, as therein mentioned. She by her anſwer inſiſted, that ſhe had done nothing after her full age, affirming the articles, and that her eſtates were not thereby bound; waiving any right under the ſame in lands of her late huſband. The decree declared that her eſtate was not bound by the marriage articles, and diſmiſſed the bill without coſts.*

* It is held that a female infant may enter into an agreement before marriage reſpecting her perſonal eſtate, which will bind her; for ſuch agreement muſt be in ſome way beneficial to her, as otherwiſe her huſband would be entitled to it, 3 *Atk. R.* 613. *ſed vide* 1 *Bro. R.* 111.

§ 16. Though

§ 16. Though a male infant cannot bind his eſtate, yet where a male infant married an adult, who covenanted that her eſtate ſhould be limited to certain uſes, he was held to be bound by ſuch covenant. By Male Infants.

§ 17. A male infant married an adult female, who covenanted that her eſtate ſhould be ſettled to certain uſes. Upon a bill filed by the truſtees of the ſettlement, to have it carried into execution by the huſband and wife, the huſband inſiſted that being an infant when he executed the ſettlement, he was not bound by it. Seccomb v. Gibbs, 2 Bro. R. 545.

Lord *Thurlow* ſaid, if a woman before marriage conveys her property, and agrees to ſettle her general expectations, when they ſhall fall in, and this be done without any fraud upon the intended huſband, ſuch an agreement muſt be executed, and the huſband, when of age, muſt anſwer her contract. I think, therefore, in this caſe, it is not neceſſary to diſcuſs the other queſtion, how far the infant huſband could be bound by his own contract, for I go upon the covenant of the wife, who was adult. And the huſband's covenant operates no more than to ſhew his concurrence, and to take away every imputation of fraud from the tranſaction.

§ 18. By the ſtatute 7 *Ann.* c. 19. it is enacted, that all infant truſtees and mortgagees ſhall be compellable to make ſuch conveyances and aſſurances as the court of chancery or exchequer ſhall direct, Infant Truſtees may convey.

which shall be as good and effectual in law, as if the said infants were of full age.

Idiots and Lunatics.

§ 19. Idiots and lunatics are not totally disabled from conveying their lands by deed, for, by the common law, neither an idiot nor lunatic could avoid his own deed. But the heir of an idiot or lunatic may avoid a deed executed by him, by pleading his disability.

2 Com. 291.

Tit. 16. ch. 6. s. 7.

§ 20. The mere execution of a deed by an idiot or lunatic is absolutely void, as against his heir. But, if an idiot or lunatic makes a feoffment, and delivers seisin in person, it is only voidable.

Infra, ch. 6.

§ 21. By the statute 4 *Geo.* 2. c. 10. idiots, lunatics, and persons *non compos mentis*, or their committees, being trustees or mortgagees, are compellable to convey under the direction of the court of chancery. And all such conveyances are declared to be good and valid.

Married Women.

§ 22. All deeds executed by married women, (except a queen consort), for the purpose of conveying away their estates, are absolutely void at law, and not voidable only.

§ 23. The acknowledgment of a deed, executed by a woman during coverture, after the death of her husband, may, in some cases, amount to a re-delivery of it, and so render it valid.

§ 24. A man

§ 24. A man and his wife being entitled to the reverſion of a houſe, in right of the wife, by deed, executed by the huſband and wife, conveyed it to a perſon by way of mortgage. After the death of the huſband, the wife, by three different papers under her hand, acknowledged the mortgage. It was held, that theſe papers were equivalent to a re-delivery of the deed. Goodright v. Straphan, Cowp. R. 201.

§ 25. A wife may, without her huſband, execute a naked authority, whether given before or after coverture, and though no ſpecial words are uſed to diſpenſe with the diſability of coverture. The rule is the ſame, where both an intereſt and an authority paſs to the wife, if the authority is collateral to, and doth not flow from the intereſt: becauſe, then, the two are as unconnected, as if they were veſted in different perſons. A married woman may alſo convey lands, in performance of a condition, where land is veſted in her on condition to convey to others. 1 Inſt. 112 *a*. *n*. 6. Vide Goodill v. Brigham, 1 Boſan. & Pul. R. 192.

A power to convey lands is now frequently given to married women, by means of a conveyance to uſes; of which, an account will be given in a ſubſequent Chapter.

§ 26. If a huſband abjures the realm, or is baniſhed, he is thereby become *civiliter mortuus*, and his wife is conſidered as a feme ſole, and may act in all things as if her huſband were naturally dead. 1 Inſt. 132 *b*. Newſome v. Bowyer, 3 P. Wms 37.

Perſons attainted. 1 Inſt. 42 *b.*

§ 27. Perſons attainted of treaſon, felony, or *præmunire*, are incapable of conveying away their eſtates, from the time when the offence was committed, provided an attainder follows. For any conveyances by them may tend to defeat the king of his forfeiture, and the lord of his eſcheat.

Who may be Grantees. 1 Inſt. 2 *b.*

§ 28. By the common law, all perſons whatever may be grantees in a deed, becauſe it is ſuppoſed to be for their benefit. Thus, an infant may be a purchaſer in a deed, and, at his full age, he may either agree, or diſagree to it; and ſo may his heirs, if he did not agree to it at his full age.

1 Inſt. 3 *a.*

§ 29. An eſtate may alſo be conveyed to a married woman, without the conſent of her huſband; and the conveyance is good, unleſs the huſband avoids it. But, though he conſents to it, yet the wife may, after his death, waive it. And if ſhe dies before her huſband, or if ſhe does not aſſent to it, during her widowhood, her heir may avoid it.

1 Inſt. 3 *a.* 8. 1. 112 *a.*

§ 30. Although a wife cannot be the immediate grantee of her huſband, yet ſhe may take an eſtate from him, through the medium of a truſtee.

1 Inſt. 2 *b.*

§ 31. An alien may be grantee in a deed, though he cannot hold it; for, upon office found, the king ſhall have it by his prerogative.

§ 32. In

Conveyances to charitable Uſes.

§ 32. In conſequence of the ſeveral ſtatutes againſt mortmain, eccleſiaſtical corporations have, for a long time, been incapable of taking lands and tenements by deed: but, as theſe ſtatutes did not extend to charitable uſes, lands might ſtill be given for the maintenance of a ſchool, an hoſpital, or any other uſe of that nature.

§ 33. It was, however, apprehended, that perſons, on their death-beds, might make large and improvident diſpoſitions, even for thoſe good purpoſes, and defeat the political ends of the ſtatutes of mortmain. It is therefore enacted by the ſtatute 9 *Geo.* 2. c. 36., that no lands or tenements, or money to be laid out thereon, ſhall be given for, or charged with, any charitable uſe whatſoever, unleſs by deed indented, executed in the preſence of two witneſſes twelve months before the death of the donor, and inrolled in the court of chancery within ſix months after its execution: and unleſs ſuch gift be made to take effect immediately, and be without power of revocation; and that all other gifts ſhall be void.

§ 34. The two univerſities, their colleges, and ſcholars upon the foundations of the colleges of *Eton*, *Wincheſter*, and *Weſtminſter*, are excepted out of this act; with this proviſo, that no college ſhall be at liberty to purchaſe more advowſons than are equal in number to one moiety of the fellows and ſtudents upon their reſpective foundations.

Conſidera-tion.

§ 35. The ſecond requiſite to a deed is a good and ſufficient conſideration.

By the common law, it is not abſolutely neceſſary that any conſideration ſhould be expreſſed in a deed: for, although a verbal contract is not binding without a conſideration, becauſe words often paſs from men lightly and inconſiderately, which may juſtify a ſuſpicion of imprudence, and even of fraud; yet, where an agreement is made by deed, which muſt neceſſarily be attended with more thought and deliberation, all ſuſpicion of ſurpriſe or deceit is excluded; and, therefore, it will be valid without any conſideration.

Plowd. 308. 3 Burr. 1670.

§ 36. Soon after the chancellors had aſſumed a juriſdiction in caſes of uſes, they adopted the maxim of the civil law, *ex nudo pacto non oritur actio.* And, in conformity to it, they determined not to lend their aid to carry any deed into execution, unleſs it was ſupported by ſome conſideration.

Tit. 11. c. 3. ſ. 21.

§ 37. There are two kinds of conſiderations, civil and moral. The firſt, which is uſually called a valuable conſideration, is money, or any other thing that bears a known value. Marriage, alſo, forms a valuable conſideration.

Treat. of Eq. B. 1. c. 5. ſ. 1.

§ 38. The ſecond, which is called a good conſideration, ariſes from an implied obligation, ſuch as that which ſubſiſts between a parent and child: for children

Idem.

dren are considered, in equity, as creditors claiming a debt, founded upon the moral obligation of the parent to provide for his child.

The love and affection which a man is naturally supposed to bear to his brothers and sisters, nephews, and nieces, and heirs at law, and the desire of preferring his name and family, are also held to be good considerations.

§ 39. The payment of a man's debts is also deemed a good consideration; as every man is under a moral obligation of satisfying his lawful creditors.

§ 40. By the statute 13 *Eliz.* c. 5. all deeds which are not founded on a valuable consideration, shall be deemed fraudulent and void, as against creditors. And by the statute 27 *Eliz.* c. 4., all deeds which are not founded on a valuable consideration, shall also be deemed fraudulent, as against subsequent purchasers.

The cases which have arisen on these statutes, will be stated in a subsequent chapter.

§ 41. The third requisite to a deed is, that it be written or printed, although it may be in any language or character whatever; but it must be written on paper or parchment; for, if it be written on stone, board, linen, leather, or the like, it is no deed. Wood and stone may be more durable, and linen less liable to erazures; but writing on paper or parchment unites

Writing on Parchment or Paper.

1 Inst. 229 a. 2 Com. 297.

unites in itſelf, more perfectly, than in any other way, both theſe deſirable qualities; for there is nothing elſe ſo durable, and, at the ſame time, ſo little liable to alterations.

Shep. Tou. 54. Perk. ſ. 118.

§ 42. All the matter and forms of a deed muſt be written before the ſealing and delivery of it. For, if a man ſeals and delivers an empty piece of parchment or paper, though he, at the ſame time, gives directions that an agreement ſhall be written above, which is accordingly done, yet it will be void as a deed.

Shep. T. 55.

Vide infra.

§ 43. An alteration, erazure, or interlining, made in any part of the deed before it is delivered, will not hurt the deed: but, in ſuch caſes, it is right to mention it in the atteſtation.

Paget v. Paget, 2 Rep. in Cha. 187.

§ 44. A deed of revocation, and a new ſettlement made by that deed, though, after the ſealing and execution thereof blanks were filled up, and not read again to the party, nor re-ſealed and executed, was yet held a good deed.

Stamps.

Fearne's Poſt. Works, 111.

§ 45. A deed muſt alſo have the regular ſtamps required by the ſeveral ſtatutes for the increaſe of the public revenue, otherwiſe it cannot be given in evidence. It ſhould, however, be obſerved, that the laws which require all deeds to be ſtamped, do not prevent their legal effect and operation, but only ſuſpend their being pleaded, or given in evidence, in any court, until they are properly ſtamped. The omiſſion of the

ſtamps,

ſtamps, in the firſt inſtance, is therefore immaterial, if the deed be afterwards duly ſtamped.

§ 46. A deed muſt be read whenever any of the parties require it; if not, the deed will be void as to the party requiring it to be read. If a perſon can, he ſhould read it himſelf; and if he be blind or illiterate, ſome other ſhould read it for him. If it be read falſely, it will be void; at leaſt for ſo much as was miſread; unleſs it be agreed by colluſion that the deed ſhould be read falſe, on purpoſe to make it void: for, in ſuch a caſe, it will bind the fraudulent party. Reading. Manſer's Caſe, 2 Rep. 3. Thowrough-good's Caſe, id. 9.

§ 47. It is abſolutely neceſſary that the party whoſe deed it is ſhould ſeal, and, in moſt caſes, ſign it alſo; for it is enacted by the ſtatute of frauds and perjuries, 29 *Cha.* 2, c. 3. that all leaſes, eſtates, intereſts of freehold or terms for years, or any uncertain intereſt in or out of lands or tenements, not put in writing and ſigned by the parties making them, or their agents authorized by writing, ſhall have no greater effect than as eſtates at will; except leaſes not exceeding three years from the making thereof, whereupon the rent reſerved ſhall be two-thirds at leaſt of the full improved value of the thing demiſed: and no ſuch eſtates or uncertain intereſts, not being copyhold, *&c.* ſhall be aſſigned, granted, or ſurrendered, unleſs by deed or note in writing, ſigned as aforeſaid, or by act and operation in law, Sealing and ſigning. Farmer v. Rogers, 2 Wilſ. R. 26.

§ 48. A perſon

Frontin v. Small, Stra. R. 705.

§ 48. A person may appoint another to be his attorney to execute a deed for him. But, in such a case, it must be executed in the name of the principal.

Delivery.

§ 49. The seventh requisite to a good deed, is, that it be delivered by the party himself, or by his certain attorney. For a deed takes effect only from its delivery; and if the date be a false or impossible one, the delivery ascertains the time from which the deed takes effect.

Goddard's Case, 2 Rep. 4.

Perk. s. 130.

§ 50. If another person seals the deed, yet if the party delivers it, he thereby adopts the sealing, and, (says Sir *W. Blackstone*), by a parity of reason, the signing also, and makes them both his own.

2 Com. 307.

§ 51. The usual mode of delivering a deed, is to take it up and say, "I deliver this as my act and deed." But a deed may be delivered to the party without words; so a deed may be delivered by words, without any act of delivery: as, if the writing sealed lies upon the table, and the feoffor says to the feoffee, Go and take up the said writing, it is sufficient for you, or it will serve the turn; or take it as my deed, or the like words, it is a sufficient delivery.

1 Inst. 36 *a.* *n.* 6. Thowroughgood's Case, 9 Rep. 136.

Shep. T. 57.

§ 52. A deed may be delivered to the party himself to whom it is made, or to any other person, by sufficient authority from him; or it may be delivered to any stranger, for and on behalf, and to the use of him

to

to whom it is made, without authority. But if it be delivered to a ſtranger, without any ſuch declaration, it ſeems it will not be a ſufficient delivery.

§ 53. A deed cannot be delivered twice; for, if the firſt delivery has any effect, the ſecond will be void. Thus, if an infant, or a perſon under dureſs of imprisonment, delivers a deed, (in which caſe, the deed is not void, but only voidable), and after, the infant being of full age, or the perſon who was under dureſs, being at large, do deliver the deed again, ſuch ſecond delivery is void. But where a feme covert ſeals and delivers a deed, and, after her huſband's death, delivers it again, the ſecond delivery is good, becauſe the firſt was void. Shep. T. 60. Ante, f. 24.

§ 54. The delivery of a deed may be either abſolute, that is, to the grantee, or to ſome perſon for him; or conditional, that is, to a third perſon, to keep it until ſomething is done by the grantee; in which laſt caſe, it is not delivered as a deed, but as an eſcrow, that is, a ſcrowl or writing, which is not to take effect until the condition is performed; and then it becomes a deed to all intents and purpoſes. 1 Inſt. 36 a.

§ 55. Where a deed is delivered as an eſcrow, it is of no force until the condition is performed; and, although the party to whom it is made ſhould get it into his poſſeſſion, before the condition is performed, yet he can derive no benefit from it. And if either of the parties ſhould die before the condition is performed, Shep. T. 59.

and

and afterwards the condition is performed, the deed is good, and will take effect from the firſt delivery: for there was *traditio inchoata* in the life-time of the parties; *et poſtea conſummatio exiſtens*, by the performance of the condition.

Shep. T. 58. § 56. In the delivery of a deed as an eſcrow, two things muſt be attended to. 1ſt, That the form of words uſed in the delivery of the deed, as an eſcrow, be apt and proper: 2d, That the deed be delivered to a ſtranger, and not to the party himſelf, to whom it is made.

Idem. § 57. The words to be uſed in the delivery of a deed as an eſcrow, are theſe: "I deliver this to you "as an eſcrow to deliver to the party as my deed, "upon condition that he deliver to you the ſum of "20 *l.* for me;" or upon any other condition then mentioned.

1 Inſt. 36 *a.* 9 Rep. 137 *a.* § 58. It is alſo abſolutely neceſſary that the delivery of a deed as an eſcrow be to a ſtranger: for, if a perſon delivers a deed to the party himſelf to whom it is made, as an eſcrow, upon certain conditions; the delivery is abſolute, and the deed will take effect immediately. Nor will the party to whom it is delivered be bound to perform the conditions.

§ 59. In the caſe of the king's letters patent, or of grants under the ſeal of the Dutchy of *Lancaſter*, the ſeal is matter of record, and, therefore, the deed needs

no

no delivery. The deed of a corporation, to which their ſeal is affixed, need not, in general, be delivered. Willis v. Jermin, Cro. Eliz. 167.

§ 60. The laſt requiſite to a deed, is the atteſtation of it by witneſſes, which is not a circumſtance eſſential to the deed itſelf, but only conſtitutes the evidence of its authenticity. Atteſtation.

TITLE

TITLE XXXII.

DEED.

CHAP. III.

Of the Form and orderly Parts of a Deed.

§ 4. *The Premiſes.*
5. *The Date.*
9. *Parties Names,* &c.
20. *Recital.*
22. *Conſideration.*
24. *Grant.*
25. *Deſcription of Things granted.*
§ 45. *Clauſe reſpecting Deeds.*
48. *Exception.*
50. *Habendum.*
52. *Tenendum.*
53. *Reddendum.*
54. *Condition.*

Section 1.

THE ſubject matter of a deed muſt be legally and orderly ſet forth, that is, there muſt be words ſufficient to ſpecify the terms and conditions of the agreement, and to bind the parties; which ſufficiency muſt be left to the courts of law to determine.

1 Inſt. 6 *a.* § 2. Antient deeds and charters were extremely ſhort, and ſuited to the ſimplicity of the times: but, when deeds grew more complicated, it became cuſtomary to divide them into ſeveral formal parts. And although it is not abſolutely neceſſary that a deed ſhould be divided in this manner, provided there are ſufficient words to ſhew the meaning and intention of the parties yet, as theſe formal and orderly parts are calculated to convey that meaning, in the cleareſt, moſt diſtinct,

distinct, and effectual manner, and have been well considered and settled by the wisdom of successive ages, it is prudent not to depart from them, without good reason or urgent necessity.

§ 3. These formal and orderly parts are, 1st, The Premises. 2d, The Habendum. 3d, The Tenendum. 4th, The Reddendum. 5th, The Condition. 6th, The Warranty. 7th, The Covenants: and, 8th, The Conclusion. Idem.

§ 4. The premises of a deed contain all that part which precedes the *habendum*, that is, the date, the parties names and descriptions, the recital, the consideration and receipt thereof, the grant, the description of the things granted, and the exception, if any. The Premises.

§ 5. The date of a deed is the description of the time when it was made, by inserting the day of the month, the year of the king's reign, and the year of our Lord; it may be placed at the beginning or at the end of a deed. It is now usually placed at the beginning of deeds indented, and at the end of deeds poll. The Date.

§ 6. In former times, deeds were not dated, because the limitation of prescription or time of memory often changed; and then it was held for law, that a deed bearing date before the limited time of prescription was not pleadable. But it became customary about the time of *Edw.* 2. and 3., to insert the date in all deeds, which has been practised ever since. 1 Inst. 6 *a.*

§ 7. It is not, however, abſolutely neceſſary, that a deed ſhould be dated; for, as has been already obſerved, if a deed has no date, or bears an impoſſible date, it will take effect from the time of its delivery.

Ch. 2. f. . Cromwell v. Grunſden, 2 Salk. 462.

§ 8. If two deeds bear the ſame date, and manifeſtly contain but one agreement, that deed ſhall be preſumed to have been firſt executed, which will beſt ſupport the clear intention of the parties.

Taylor v. Horde, 1 Burr. 106.

Parties Names, &c.

§ 9. With reſpect to the parties to a deed, they are either active or paſſive. Thoſe who grant, enfeoff, or demiſe, are the active parties, and are called the grantors, feoffors, or leſſors; and thoſe to whom lands are granted, enfeoffed, or demiſed, are the paſſive parties, and are called the grantees, feoffees, or leſſees.

§ 10. The parties to a deed ought to be deſcribed by their proper chriſtian and ſirnames, their rank or degree, profeſſion, and place of reſidence. But miſtakes in the deſcription of the parties will not, unleſs very groſs, make a deed void: for if the deſcription, however imperfect, is ſufficient to diſtinguiſh the perſon deſcribed from all others, it will be good; *nihil facit error nominis cum de corpore conſtat.*

1 Inſt. 3 *a.*

§ 11. If, therefore, lands be granted to *Robert* Earl of *Pembroke*, when his name is *Henry*, or to *George* Biſhop of *Norwich*, when his name is *John*, it will be good: for in theſe, and the like caſes, no doubt or uncertainty can ariſe, as there can be but one perſon having thoſe dignities.

§ 12. A wife

§ 12. A wife is alſo a good name of purchaſe, without a chriſtian name: and ſo it is, if a chriſtian name be added, and miſtaken; for *utile per inutile non vitiatur*. Idem.

§ 13. But if an ordinary perſon grants by his ſirname only, without any name of baptiſm, or by his name of baptiſm without any ſirname at all, in theſe, and ſuch like caſes, the deed will be void for uncertainty; unleſs there be ſome other matter in the deed to help it, or ſomething done afterwards to ſupply this defect. Idem.

§ 14. A name, acquired by reputation only, will be conſidered as a ſufficient deſcription of a perſon: for all ſirnames were originally acquired by reputation. Hence it has been often held, that a baſtard is ſufficiently deſcribed by the name by which he has been uſually known. Idem.

§ 15. A perſon may be deſcribed in a deed without mentioning either his chriſtian or ſirname: as, if a grant be made *primogenito filio*, or *ſeniori puero* of *J. S.*, it will be good. And in the uſual limitation of remainders to perſons unborn, they are neceſſarily deſcribed in this manner. Idem.

§ 16. The word iſſue is a good deſcription in a deed, and is equivalent in its import to the words child, or children; and, therefore, a grant to the iſſue, or iſſue of the body of *A.*, is good. 1 Inſt. 28 *a*.

§ 17. In conſequence of the maxim that *nemo eſt hæres viventis*, an immediate grant to the heirs of *A.*, is void. But a remainder may be limited to the heirs of *A.*, which will be good, in caſe *A.* dies during the continuance of the particular eſtate, or at the inſtant of its determination. And a grant to the heirs of a perſon who is dead is good; for, in that caſe, the word heirs is a ſufficient deſcription of the perſon intended to take.

Tit. 16. c. 1. ſ. 16.

Venables v. Morris, 7 Term R. 342. 438.

§ 18. Lord *Coke* ſays, if a remainder is limited to the heirs female of the body of *A.*, and *A.* dies leaving a ſon and a daughter, the daughter can take nothing by this limitation, becauſe ſhe is not heir; for the perſon claiming under ſuch a deſcription muſt fully anſwer it, and, conſequently, a perſon having only half the deſcription, will be excluded. Now, the deſcription conſiſts of two parts, one, requiring that the donee ſhould be heir, the other, that the donee ſhould be a female; and, in the caſe put by Lord *Coke*, the daughter is not heir, ſhe having a brother. This doctrine has been controverted, but is very ably defended by Mr. *Hargrave* in a note to this paſſage.

1 Inſt. 24 *a.* *n.* 3.

Beckford v. Pendarvis, 5 Bro. Parl. Ca. 93.

Vide Treat. of Eq. B. 1. c. 6. ſ. 11.

§ 19. In conveyances by or to corporations, the deſcription of the corporation muſt be ſuch as to diſtinguiſh it from all other corporations. But there is no caſe where a grant by a corporation has been held void, on account of any variance in any of theſe four circumſtances, namely, Addition, Interpoſition, Omiſſion, or Commutation; if they retain the four firſt principles of ſubſtance, *viz.* name of perſons, of houſe, foundations,

Fanſhaw's Caſe, Moo. 235.

foundations, or dedications, places known before the foundation, in which the houſe is ſituated.

§ 20. A rectial is a narration of ſuch deeds, agreements, or facts, as are neceſſary to explain the nature of the grantor's title, and the motives and reaſons upon which the deed is founded and entered into: and, although a recital is not abſolutely neceſſary, yet it is now uſually inſerted, for the purpoſe of ſhewing the origin and derivation of the title, or of ſtating ſome prior facts which are connected with, or relate to, the ſubject matter of the deed. Recital.

§ 21. The cuſtom of modern conveyancers is, to recite the title from the laſt eſtate in fee-ſimple, and ſo derive it from thence to the perſon who is to be the donor or grantor in the deed; by which means, the donee or grantee will always know how to make out his title, even if his title-deeds ſhould happen to be loſt or deſtroyed, by means of counterparts, wills, and matters of record; and it is highly proper that every deed ſhould contain ſuch recitals as may ſhew its nature and object, and the motives which produced it, and render it unneceſſary that other deeds ſhould be conſulted for its explanation.

§ 22. After the recital follows an account of the conſideration, and, if it be a pecuniary one, the payment of it is mentioned, and the grantor acknowledges the receipt of it, and gives the grantee a releaſe. Conſideration.

After the real conſideration is mentioned, it is proper to add theſe words,—" And for divers other " good cauſes and conſiderations him the ſaid *A. B.* " thereunto moving." Becauſe, where theſe words are inſerted, other conſiderations beſides thoſe mentioned in the deed may be averred.

§ 23. The acknowledgement of the receipt of the conſideration money inſerted in the deed is ſufficient, but the conſtant practice now is to indorſe a receipt for the conſideration money on the back of the deed.

Grant.

§ 24. The next thing in the premiſes of a deed is the grant or releaſe, by which the lands are tranſferred. The technical words, by which this transfer is made, differ according to the different conveyances which are uſed for that purpoſe, and will therefore be more properly conſidered when the nature of thoſe different conveyances is explained.

Deſcription of the Things granted.

§ 25. The grant is immediately followed by the deſcription of the things granted which cannot be too minute and accurate. Every thing intended to be conveyed muſt be particularly mentioned in the premiſes, and ſhould be ſet down in its proper order, ſuch as manors, meſſuages, farms, lands, tenements, hereditaments, *&c. &c.* all which ſhould be deſcribed by their ſituation, county, hundred, tithing or vill, bailiwick, hamlet, or pariſh, number of acres and boundaries, in whoſe tenure and occupation; and ſometimes from whom purchaſed.

§ 26. The

§ 26. The word manor has a very extenſive ſignification, for it will paſs, 1ſt, All the demeſnes, that is, all the lands whereof the lord is ſeiſed within the manor, which are in his own occupation, or let out in leaſes, or held by copyholders, or other cuſtomary tenants; together with all the waſtes within the manor. 2d, All the ſervices, ſuch as fealty, ſuit of court, rents, *&c.* And 3d, All courts leet and courts baron, with the fines and perquiſites annexed thereto, and all other franchiſes that are parcel of, or appendant to the manor, at the time of the conveyance.

§ 27. But things which are not parcel of the manor, will not paſs by a conveyance of a manor, unleſs perhaps they have gotten from time immemorial a reputation of appendancy. Shep. T. 92.

§ 28. A grant of a manor with all advowſons, *&c.* thereunto belonging, will not extend to an advowſon ſevered in ancient times; though it was appendant to the manor three hundred years ago. Rex v. Epiſc. Durham, Com. R. 361.

§ 29. Lands held in fee ſimple of a manor are not conſidered as parcel of the manor, although the rents and ſervices iſſuing out of thoſe lands are parcel of the manor. But where lands which are part of the demeſnes of a manor are granted for life only, the reverſion remains parcel of the manor and will paſs by a conveyance of the manor; *for* (as Mr. *Pigott* obſerves) when a man is ſeiſed of a manor and demeſnes in poſſeſſion, and makes a leaſe for life, and parts with the poſſeſſion of what he ſo leaſes, in lieu of the Rich v Barker, Hard. R. 131. 1 Inſt. 324 *b.* Pigott Recor. 42.

poſſeſſion, he has the reverſion and ſervices, which are annexed to the manor, and conſtitute a part of it, and the reverſion and ſervices naturally follow the right and nature of the land.

Tit. 1. ſ. 14.

6 Rep. 66 *b.* Thinne v. Thinne, Sid. 190. Lev. 28.

§ 30. It has been ſtated that although many manors have been deſtroyed, yet they continue to be called manors, though they are only reputed manors; and a reputed manor will paſs in a conveyance by the word manor.

Shep. T. 94. 1 Inſt. 5 *b.* 56 *b.* Smith v. Martin, 2 Saund. 400.

31. The word meſſuage is ſynonymous with dwelling houſe. And a grant of a meſſuage with the appurtenances will not only paſs a houſe, but all buildings attached or adjoining to it; and alſo its orchard, garden, and curtilage, with the cloſe on which the houſe is built. But if a greater quantity of land has been uſually occupied with ſuch houſe, ſtill it will not paſs.

Shep. T. 93.

§ 32. The word farm comprehends many things; for by a conveyance of a farm will paſs a meſſuage, land, meadow, paſture, wood, *&c.* thereto belonging, or therewith uſed: becauſe this word properly ſignifies a meſſuage with a quantity of demeſnes thereto belonging.

1 Inſt. 4 *a.* Tit. 1. ſ. 3, 4.

§ 33. The word land, ſtrictly taken, only ſignifies arable land. But in a larger ſenſe it comprehends any ground, ſoil, or earth, whatever; and therefore a grant of all lands will paſs arable, meadow, paſture, wood, moor, marſh, furze, heath, *&c.* together with

with all buildings ſtanding thereon, and all mines, minerals, and foſſils, under the ſurface thereof.

§ 34. The word tenement is of ſtill greater extent, and though in its uſual acceptation it is only applied to houſes, and other buildings; yet in its original proper and legal ſenſe, it ſignifies every thing that may be holden, provided it be of a permanent nature, whether it be of a ſubſtantial and ſenſible, or of an unſubſtantial ideal kind. Thus the words *liberum tenementum* or frank tenement, are applicable not only to land, but alſo to rents, commons, offices, and the like. 1 Inſt. 6 a.

§ 35. The word hereditament is much the largeſt and moſt comprehenſive expreſſion uſed in conveyances: for it includes not only lands and tenements, but alſo whatever may be inherited, be it corporeal or incorporeal, real, perſonal, or mixt. Thus an heir loom or piece of furniture, which by cuſtom deſcends to the heir, together with a houſe, is neither land nor tenement, but a mere moveable, yet being inheritable, it is compriſed under the general word hereditament. And ſo a condition, the benefit of which may deſcend to a man from his anceſtor, is alſo an hereditament. Idem 6 a. 3 Atk. 82.

§ 36. A deed will however be good, although the ſeveral things comprehended therein be not deſcribed by their proper appellations or ſet down in a regular manner. For if the deſcription be ſufficient to ſhew clearly what was meant and intended to be conveyed; it

it will not become void on account of any immaterial inaccuracy or miſtake.

§ 37. A grant of glebe land and tithes lying in a particular place which was named, which were late in the occupation of *A. B.* (which was not the fact) was held good.

Swift v. Eyres, Cro. Car. 546.

§ 38. A corporation demiſed in theſe words—All that their glebe lands lying in *Cheſterton*, *viz.* ſeventy-eight acres of land, and alſo the demeſnes of the ſaid ſeventy-eight acres, with all profits, commodities, tithes, *&c.* belonging to the ſaid corporation; and alſo the tithes of the ſaid ſeventy-eight acres, all which lately were in the farm or occupation of *Margaret Peto*.

The tithes of the lands never were in the occupation of *Margaret Peto*; and the queſtion was, whether they paſſed to the leſſee.

It was ſtrongly urged for the plaintiff, that thoſe words in the indenture were a clauſe of reſtriction, and declared their intent that nothing ſhould paſs but what was in the tenure of *Margaret Peto*. But all the Juſtices held that it was a good grant, and no reſtriction of the firſt words, becauſe there are three diſtinct clauſes before, *viz.* Firſt, the grant of ſeventy-eight acres of glebe; ſecondly, the grant of the tithes predial and perſonal; thirdly, the grant of the tithes of the ſeventy-eight acres of glebe. This clauſe "all which, *&c.*" does not depend upon any of them, and

and "which were, *&c.*" is a reſtriction only when the clauſe is general, and is all but one and the ſame ſentence, and not ended or certain before the end of the ſentence: But where the clauſe is not in one entire ſentence, but diſtinct and disjoined from the other, as here it is, there cannot be any reſtriction.

§ 39. If however the thing is not granted by an expreſs name; a miſtake in the deſcription of the perſon, in whoſe occupation it is ſaid to be, will make the grant void. 2 Mod. 3.

§ 40. A leaſe of a yard does not paſs a cellar ſituate under that yard; and the leſſor in an ejectment brought to recover the cellar, is not eſtopped by his deed, from going into evidence to ſhow that the cellar was not intended to be demiſed.

§ 41. A leaſe was made of certain parts of a meſſuage ſituate on the weſt ſide of *Swallow-ſtreet, Weſtminſter*, deſcribed to be one room on the ground floor, and a cellar thereunder, and a vault contiguous and adjoining thereto, and three rooms together with the ground whereon the ſame ſtood, together with a *piece of ground* on the north ſide, particularly deſcribing it, late in the occupation of *A.* there was a cellar under the piece of ground which the defendant claimed, reſting his title on the maxim that *cujus eſt ſolum ejus eſt uſque ad cælum*, &c. Doe v. Burt, 1 Term Rep. 701.

The leſſor of the plaintiff offered evidence to ſhew that at the time of the leaſe the cellar in queſtion was

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in the occupation of *B.* another tenant; and therefore that it could not have been the intention of the parties that it ſhould paſs by the leaſe to the defendant, and that the defendant had not claimed it till after the expiration of that leaſe. The defendant's counſel objected to this evidence, becauſe the leſſor of the plaintiff was eſtopped by his own deed, from ſaying it was not meant to paſs. But *Buller*, J. was of opinion that the evidence was admiſſible; and the plaintiff obtained a verdict, with liberty to the defendant to enter a nonſuit if the objection were well founded.

The court was of opinion that it was proper to receive the evidence offered at the trial; which, when received, proved that the cellar was not intended to be paſſed by the demiſe.

§ 42. The words all lands and meadows to the ſaid meſſuage or mill belonging, or uſed, occupied, or enjoyed, or deemed, taken, or accepted as part thereof, have been held to paſs in a releaſe, leaſehold as well as freehold lands.

Doe v. Williams, 1 H. Black. R. 25.

§ 43. In an indenture of releaſe the parcels were deſcribed to be all that meſſuage, mill, and lands, called *Clock Mills*, and all lands and meadows to the ſaid meſſuage or mill belonging, or uſed, occupied, and enjoyed, or deemed, taken, or accepted as part thereof. There were ſome lands held for the remainder of a term of a thouſand years, which had been

been occupied with, and reputed part of, the *Clock Mills* eſtate, for upwards of thirty years.

It was objected that theſe lands being leaſehold did not paſs by the releaſe, but it was determined that they did paſs.

§ 44. Modern conveyancers have introduced a ſet of general words after the particular deſcription of the things intended to be conveyed, which are now uſually adopted, and are frequently uſeful. And after thoſe general words is uſually inſerted the words—"And "all the eſtate, right, title, intereſt, uſe, truſt, pro- "perty, claim, and demand, both at law and in "equity of the ſaid *A. B.*, in, to, and out of the "ſame premiſes, and every or any part or parcel "thereof."—But this clauſe only applies to caſes where the grantor departs with his whole eſtate and intereſt in the thing granted.

§ 45. The next clauſe uſually inſerted in the premiſes is—"Together with all deeds, evidences, and "writings, *&c.*" for although in general deeds follow the land, and a purchaſer in fee is entitled to them, without any particular grant for that purpoſe, yet it is not amiſs to inſert this clauſe, and in conveyances to uſes it ought never to be omitted; becauſe in that caſe, there is a doubt, whether the deeds go to the releaſees to uſes, or to the *ceſtui que uſe*. Clauſe reſpecting Deeds. 1 Inſt. 6 *a*. *n*. 4. 1 Rep. 1.

§ 46. In caſes where the grantor warrants the title againſt all mankind, he is entitled to retain the deeds Idem.

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in his poſſeſſion, becauſe he is bound to defend the title at his peril.

§ 47. Where only a part of an eſtate held under one title is ſold, this clauſe is not inſerted, becauſe the grantor is allowed in that caſe to keep the title deeds, and the grantee is only entitled to a covenant from the grantor to produce the deeds whenever there ſhall be occaſion for them.

Exception.

§ 48. The next clauſe in the premiſes of a deed is that, whereby the grantor excepts ſomething out of that which he has before granted, by which means it does not paſs by the grant, and is ſevered from the thing granted.

Shep. T. 77.

§ 49. The following circumſtances are neceſſary to make a good exception. 1ſt, It muſt be made by apt words. 2d, The thing excepted muſt be part of the thing previouſly granted, and not of any other thing. 3d, It muſt only be a part of the thing granted, for if the exception extends to the whole, it will be void. 4th, It muſt be of ſuch a thing as is ſeverable from the thing granted, and not an inſeparable intereſt or incident. 5th, It muſt be ſuch a thing as that he who excepts may retain it. 6th, It muſt be of a particular thing out of a general one; not a particular thing out of a particular one. 7th, It muſt be certainly deſcribed and ſet down.

Dorrell v. Collins, Cro. Eliz. 6.

Habendum.

§ 50. The ſecond part of a deed is the *habendum*, the proper office of which is to determine what eſtate

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or intereſt is granted by the deed; though that may be alſo done in the premiſes. It is called the *habendum* becauſe in all the old *Latin* deeds it began with that word.

§ 51. The deſcription of the things granted need not be repeated in the *habendum*, as it is ſufficient that they are deſcribed in the premiſes. For it is in the premiſes that the grant is really made, and the very word *habendum*, or to hold, as it is tranſlated, indicates a reference to what is deſcribed in the premiſes. With reſpect to the words required by the law to create an eſtate in fee, &c. in a deed they will be ſtated in a ſubſequent chapter.

§ 52. The third part of a deed is called the *tenendum*, which was formerly uſed to expreſs the tenure by which the eſtate granted was to be held. But ſince all freehold tenures have been changed into free and common ſocage, the *tenendum* is of no farther uſe, and is therefore joined to the *habendum*. Tenendum.

53. The fourth part of a deed is the *reddendum*, whereby the feoffor or leſſor reſerves ſome new thing to himſelf out of that which he granted before. The following circumſtances are required to make a good reſervation. 1ſt, It muſt be by apt words. 2d, It muſt be of ſome other thing iſſuing or coming out of the thing granted, and not a part of the thing itſelf, nor of ſome thing iſſuing out of another thing. 3d, It muſt Reddendum. Shep. T. 80.

must be of ſuch a thing whereunto the grantor may have reſort to diſtrain. 4th, It muſt be made to one of the grantors, and not to a ſtranger to the deed.

Vide Tit. 28. c. 1. ſ. 17. &c.

Condition. Tit. 13.

§ 54. The fifth part of a deed is the Condition, which has been deſcribed in a former title.

TITLE XXXII.

DEED.

CHAP. IV.

Same Subject continued.—Warranty.

§ 1. *Warranty.*
2. *Expreſs Warranty.*
5. *Implied Warranty.*
9. *Lineal Warranty.*
11. *Aſſets.*
14. *Collateral Warranty.*
18. *Statute of Glouceſter.*
19. *Statute de Donis.*
§ 23. *A Collateral Warranty bars Eſtates Tail.*
24. *And all Remainders Expectant thereon.*
27. *Statute* 11 *Hen.* 7. *c.* 20.
28. *Statute* 4 *Ann, c.* 16.
29. *How a Warranty may be deſtroyed.*

Section 1.

THE ſixth part of a deed is the warranty, which is deſcribed by Lord *Coke* to be, "a covenant real "annexed to lands or tenements, whereby a man and "his heirs are bound to warrant the ſame, and, either "upon voucher or by judgment in a writ of *warran-* "*tia cartæ*, to yield other lands and tenements to the "value of thoſe that ſhall be evicted by a former title, "or elſe may be uſed by way of rebutter." Warranty. 1 Inſt. 365 *a.*

§ 2. A warranty may either be expreſſed or implied, either in deed or in law. An expreſs warranty, or a warranty in deed, is when the perſon who conveys an eſtate enters into an expreſs warranty to the purchaſer: and, in this caſe, the word *warrantizo*, or warrant, is the only apt and effectual word. Expreſs Warranty. 1 Inſt. 384 *a.*

Lit. f. 773. 1 Inſt. 383 *b.* § 3. The uſual form of a warranty was *ego et hæredes mei warrantizabimus*, and the word heirs is abſolutely neceſſary, for, if not inſerted, the heirs are not bound. So, with reſpect to the perſon to whom a warranty is made, it is held, that, unleſs it be to another and his heirs, or in words which relate to heirs, it extends only for life.

1 Inſt. 47 *a.* 384 *b.* 385 *b.*

§ 4. To make a good expreſs warranty, the following circumſtances are neceſſary: 1ſt, That the perſon who makes a warranty be capable of ſo doing: for, if an infant makes a feoffment in fee of land, and binds himſelf and his heirs to warrant it, the warranty is void, though the feoffment be only voidable.

Inſt. 367 *b.*

1 Inſt. 386 *a.* 2d, A warranty muſt be made by deed in writing; for a warranty inſerted in a will would be void. 3d, There muſt be ſome eſtate to which the warranty is annexed, that is capable of ſupporting it; for, if a perſon covenants to warrant land to another, and makes him no eſtate, or makes him an eſtate that is not good, and covenants to warrant the thing, in theſe caſes the warranty is void. 4th, The eſtate to which the warranty is annexed, muſt be capable of ſupporting it; that is, it muſt be an eſtate of freehold: for, if a perſon makes a leaſe for years, and binds himſelf and his heirs to warrant the land to the leſſee, this is no warranty, though it may amount to a covenant. 5th,

1 Inſt. 378 *a.*

1 Inſt. 386 *a.* The warranty muſt deſcend upon the perſon, who is heir, of the whole blood by the common law, to him who made the warranty. 6th, The heir muſt continue heir, and neither the deſcent of the title, nor of the warranty, be interrupted: for, if a perſon binds himſelf

Lit. f. 745.

ſelf and his heirs to warranty, and afterwards is attainted of treaſon or felony and dies, this warranty will not bind his heirs. So if a tenant in tail be diſſeiſed, and, after, releaſe to the diſſeiſor with warranty, and the tenant in tail is attainted of felony, and hath iſſue and dies, this warranty will not bind the iſſue. 7th, The eſtate that is to be barred by a warranty muſt be diveſted and turned to a right, before or at the time when the warranty is made; and the perſon on whom the warranty deſcends, muſt then have but a right to the land. 8th, The warranty muſt take effect in the life-time of the anceſtor, who muſt be bound by it; for the heir ſhall never be bound by an expreſs warranty, unleſs the anceſtor was bound by it. 9th, The heir muſt claim in the ſame right that the anceſtor does: ſo, the heir muſt be of full age, when the warranty falls upon him, otherwiſe he will not be barred by it.

10 Rep. 96. Vide Tit. 35.

1 Inſt. 386 *a*.

1 Inſt. 370 *a*.

1 Inſt. 380.

1 Lord Ray. 35.

§ 5. Implied warranties, or warranties in law, are thoſe which ariſe from the nature of the deed itſelf, or from ſome other word than the word warranty. Thus the words *dedi et conceſſi*, or the word *dedi* alone, in a feoffment, amount to an implied warranty, during the life of the feoffor. But the word *conceſſi* alone does not create an implied warranty.

Implied Warranty.

1 Inſt. 384 *a*.

§ 6. In an exchange, the word *excambium* imports a mutual warranty: and, in partition, it is implied that the one warrants to the other. So, where there is a gift in tail, or a leaſe for life of land, reſerving rent, the donor or leſſor is bound to warranty.

1 Inſt. 384 *a*. & *b*.

1 Inſt. 384. n. 1.

§ 7. It has been generally ſuppoſed, that the word grant, in any conveyance, will create a warranty, and therefore truſtees are adviſed not to convey by the word grant. But it is now agreed, that the word grant, when uſed in the conveyance of an eſtate of inheritance, does not imply a warranty, and that, if it did, the inſertion of any expreſs covenant, on the part of the grantor, would qualify and reſtrain its force and operation within the import and effect of that covenant; as the law will not, when it appears by expreſs words, how far the parties deſigned the warranty ſhould extend, carry it farther by conſtruction.

1 Inſt. 384 *a*.

§ 8. Lord *Coke* ſays, if a man makes a leaſe for life, reſerving a rent, and adds an expreſs warranty, it will not take away the warranty in law, for the leſſee will have his election to vouch by force of either of them.

Lineal Warranty.

§ 9. Warranty is again divided into lineal and collateral. Lineal warranty is, where the heir derives, or might by poſſibility derive his title to the land warranted, either from or through the anceſtor who made the warranty. Thus, where a man, ſeiſed in fee of lands, made a feoffment of them to another, and bound himſelf and his heirs to warranty, and died, leaving a ſon, upon whom the warranty deſcended, it was a lineal warranty: ſo, where a father or an eldeſt ſon, in the lifetime of his father, releaſed to a diſſeiſor with warranty, this was lineal to the youngeſt ſon.

Lit. ſ. 707.

§ 10. The

§ 10. The effects of a lineal warranty are, 1ſt, To bar the warrantor and his heirs from ever claiming the lands warranted; ſo that, if a purchaſer with warranty is impleaded by the warrantor or his heirs, he may ſhow his warranty, which, in pleading, is called a rebutter, and is an effectual bar to the claim of the warrantor or his heirs.

2d, To compel the warrantor, and his heirs, to give the warrantee, in caſe of eviction, lands of equal value to thoſe he has loſt; and, therefore, if a purchaſer with warranty is impleaded or ſued by a ſtranger for the land, he may vouch, that is, call in the warrantor, or his heirs, to defend the land; and if the vouchee cannot defend them, he muſt then give the warrantee lands of equal value to thoſe he has loſt. Vide Tit. 36.

§ 11. The obligation which the heir of the warrantor is under, of giving the warrantee, in caſe of eviction, lands of equal value to thoſe he has loſt, was, however, only on condition, that he had other lands of equal value by deſcent from the warranting anceſtor, which are called *Aſſets*. Aſſets.

§ 12. Lands in the poſſeſſion of an heir muſt have the following qualities, in order to be conſidered as aſſets. 1ſt, They muſt be of equal or greater value than the lands warranted at the time of their deſcent, from whence they derive the name of aſſets. 1 Inſt. 374 *a*.

2d, They muſt be held in fee-ſimple, have deſcended from the common anceſtor, and be veſted in poſſeſſion, and not in right.

Fitz. N. B. 134. 1 Rep. 1.

§ 13. A purchaſer with warranty may, at any time, bring a writ of *warrantia chartæ* upon the warranty, either againſt the warrantor or his heirs; and, by that means, all the lands whereof the warrantor or his heirs was ſeiſed at the time of ſuing out the writ, will be bound and charged with the warranty.

Collateral Warranty. 2 Com. 301.

§ 14. A collateral warranty has been defined to be, where the heir's title to the land neither was, nor could have been, derived from the warranting anceſtor; and yet it barred the heir from ever claiming the land, and alſo impoſed on him the ſame obligation of giving the warrantee other lands in caſe of eviction, as if the warranty were lineal, provided the heir had aſſets.

Lit. ſ. 704.

§ 15. Thus, *Littleton* ſays, if there be father and ſon, and the ſon purchaſes lands in fee, the father diſſeiſes him, and aliens to a ſtranger with warranty; this is a collateral warranty, which will effectually bar the ſon from ever claiming thoſe lands; and, although the ſon be lineal heir to his father, yet, as he does not derive his title to this eſtate from his father, the warranty is collateral.

Lit. ſ. 707.

So, if a younger brother releaſed to his father's diſſeiſor, with warranty, it was collateral to the elder brother.

§ 16. The effect of a collateral warranty is ſo ſingular, and ſo apparently unjuſt, that many enquiries have been made reſpecting its origin. Sir *Martin Wright* endeavours to account for it in the following manner:

It

It was a maxim of our ancient law, that no perſon could alien his feud without the conſent of his next collateral heir, *qui proximus erat in ſucceſſione collateralı;* for, although the law truſted the anceſtor with the intereſt of his own immediate deſcendants, yet he could not diſinherit the next collateral heir, who, having a diſtinct, though remote intereſt in the feudal donation, could not be deprived of it but by an act of his own; this manifeſtly points out the foundation, and, partly, ſuggeſts the reaſon of collateral warranty; though it is not eaſy to conceive how it came to paſs, that the concurrence or ſimple conſent of the next collateral, which, by the old law, was requiſite to defeat his own hopes of ſucceſſion, ſhould ſwell up to our notions of collateral warranty, and be advanced into a means to defeat, even eſtates to which ſuch collaterals could have no poſſible hopes of ſucceeding. Wright's Ten. 163.

§ 17. Lord Chief Baron *Gilbert*, whoſe authority is of the greateſt weight, has endeavoured to account for collateral warranty in another manner. He thinks it aroſe from the conſtruction of the ſtatute *de Donis*. It was uſual to quiet diſſeiſins, which were very frequent in thoſe unſettled times, by the diſſeiſor's purchaſing warranties from ſome anceſtor of the family, and this gave a right to ſuch diſſeiſor; for it was eaſier to compound with the anceſtor, than with the party to whom the wrong was actually done: and it was determined, for the quieting men's poſſeſſions, that ſuch warranties ſhould bind, if the owner acquieſced under his expectations from the warranting anceſtor, and did not, during his life, attempt to recover the lands; Ten 143.

for no warranty was ever a bar, until it deſcended on a perſon, that is, until after the death of the warrantor.

Rot. Parl. v. 2. p. 332. n. 27.

§ 18. Collateral warranty was ſo great a grievance, that in 50 *Edw.* 3., the commons petitioned the king to declare that no collateral warranty ſhould thenceforth be a bar, unleſs where aſſets deſcended from the warranting anceſtor; to which, his Majeſty anſwered, that he would conſider of it until the next parliament.

Statute of Glouceſter.

§ 19. There have been ſeveral ſtatutes made to reſtrain the operation of warranties. The firſt of theſe is the ſtatute of *Glouceſter*, 6 *Edw.* 1. c. 1., by which it was enacted, that if a tenant by the curteſy aliened the eſtate which he held by the curteſy, with warranty, his ſon ſhould not be barred by ſuch warranty, unleſs he inherited lands of equal value from his father.

2 Inſt. 291. 1 Inſt. 365 *a.*

Statute *de Donis.*

§ 20. The next ſtatute by which the operation of warranties was qualified, was the ſtatute *de Donis Conditionalibus*, the object of which being to ſecure the continuance of the eſtate tail to the iſſue of the donee, and the reverſion to the donor, upon the determination of the eſtate tail; it was held by the judges, that a tenant in tail could not bar his iſſue by a lineal warranty. But by a kind of analogy to what the legiſlature had done, by the ſtatute of *Glouceſter*, they held, that ſuch a warranty would bar the iſſue, if they inherited from the warranting anceſtor an eſtate of equal value to that which he had warranted; that is, that

Lit. ſ. 708. Gilb. Ten. 142.

1 Inſt. 384 *a.*

that a lineal warranty by a tenant in tail, was no bar to the iſſue without aſſets.

§ 21. This reaſoning may be extended to the reverſion of the perſon creating the intail, for the ſtatute *de Donis* is as preciſe in its protection of the donor's reverſion, as of the eſtate tail itſelf; and, therefore, it may be concluded, that no warranty of the tenant in tail will rebut the donor from claiming the reverſion, upon the determination of the eſtate tail.

§ 22. *William Veſey* deviſed the lands in queſtion to *John Veſey* his eldeſt ſon for life, and, after, to the heirs male of his body, remainder to *Robert Veſey* and the heirs male of his body, remainder to *William Veſey* and the heirs male of his body, remainder to *Mathew Veſey* and the heirs male of his body, and died. *John* entered and died without any male iſſue, leaving two daughters, *Elizabeth* and *Sarah*. After the death of *John*, *Robert* entered, and died ſeiſed without male iſſue; upon which, *William* entered, and *Mathew* died without iſſue male in the lifetime of *William*. Bole v. Horton, Vaugh. 360.

William made a feoffment of the lands, with warranty to the uſe of himſelf for life, remainder to the uſe of *Ann* his wife for life, remainder over. *William* died without leaving any male iſſue, and *Ann* his wife entered.

Elizabeth and *Sarah*, the daughters and coheirs of *John*, brought a formedon in the reverter againſt *Ann* the widow of *William*, who pleaded the warranty of *William*,

William, whoſe couſins and coheirs they were; and the queſtion was, whether *Ann* could rebut them by the warranty.

Lord Chief Juſtice *Vaughan* argued, that the ſtatute *de Donis* reſtrained the warranty of tenant in tail from barring the donor's reverſion, by expreſsly providing, that the donee in tail ſhould not have it in his power to bar the donor of his reverſion. *Ita quod non habeant illi, quibus tenementum ſic fuit datum ſub conditione, poteſtatem alienandi tenementum ſic datum, quo minus ad exitum illorum quibus tenementum ſic fuerit datum remaneat poſt eorum obitum, vel ad donatorem vel ad ejus hæredem (ſi exitus deficiat) revertatur.* By theſe words, the donee or tenant in tail is reſtrained from all power of alienation, whereby the lands entailed may not deſcend to the heir in tail after his death; therefore, by theſe words, he is reſtrained from alienation with warranty, which doubtleſs would hinder the lands ſo to deſcend, if it were not reſtrained by the words of the ſtatute. By the ſame words, the donee in tail is reſtrained from the power of alienation, whereby the land intailed may not revert to the donor for want of iſſue in tail. Therefore, by theſe words, he is reſtrained from ſuch alienation with warranty, whereby the lands may not revert to the donor or his heirs, for want of iſſue in tail; for the ſame words of the ſtatute muſt be of equal power and extent to reſtrain the donee's alienation from damaging the donor, as from damaging the iſſue in tail. Admit the words of reſtraint in the ſtatute *de Donis* had been *rex ſtatuit, &c. Ita quod non habeant illi, quibus tenementum ſic fuit datum ſub conditione,*

tione, poteſtatem alienandi tenementum ſic datum, per warrantiam, vel aliter quo minus ad exitum eorum remaneat, vel ad donatorem revertatur; it had then been clear to every underſtanding, that the warranty of the donee or tenant in tail, by the expreſs words of the ſtatute, did neither bar the donor nor the iſſue in tail, and then obſerve what conſequences had been rightly deduced from ſuch reſtraint made by the ſtatute. The ſtatute expreſsly reſtrains the warranty of tenant in tail from barring his iſſue; whence it follows, that, by the ſtatute, the iſſue in tail is not barred by the lineal warranty of the tenant in tail, becauſe his warranty upon the iſſue in tail cannot poſſibly be any other than a lineal warranty. It may be ſaid, in like manner, that the ſtatute *de Donis* reſtrains the warranty of tenant in tail from barring the donor, or his heir, of the reverſion: the conſequence, thence deducible, is, that the ſtatute reſtrains the collateral warranty of tenant in tail from barring the donor or his heirs, becauſe his warranty falling upon the donor, or his heir, can be no other than a collateral warranty. Now, it is true, the word warranty is not, in ſyllables, within the reſtraint of the ſtatute; but it is neceſſarily implied in it, elſe the iſſue in tail would be barred by the warranty of tenant in tail, without aſſets, contrary to all the books ſince the making of the ſtatute. But thoſe general words of the ſtatute reſtraining the donees power of alienation in expreſs terms equally and *pari paſſu* for the benefit of the donor, as for the benefit of the iſſue in tail, can never be underſtood to reſtrain the warranty of tenant in tail only, for the benefit of the iſſue in tail, but not for the benefit of the donor. But the ſtatute muſt neceſ-

ſarily

ſarily reſtrain his warranty indefinitely from hurting either; and, by conſequence, his lineal warranty is reſtrained from hurting his iſſue, and his collateral warranty from hurting the donor, to whom his warranty can never be but collateral, as it can never be but lineal, to the iſſue in tail. And if the warranty be neceſſarily underſtood and implied in the ſtatute, its operation muſt be the ſame as if it had been expreſsly inſerted in the ſtatute. Then, to ſay, that by the reſtraint of the ſtatute, the donees have *not* power to alien the land intailed *quo minus ad exitum illorum remaneat poſt illorum mortem*, but they *have* power to alien *quo minus ad donatorem revertatur deficienti exitu*, would be to make the ſtatute contradictory to itſelf.

No judgment was given in this caſe, the court being divided; *Vaughan* and *Archer* for the demandant; and *Wylde* and *Atkyns* for the tenant: but *Vaughan*'s opinion is generally held to be law.

A collateral Warranty bars Eſtates Tail. Gilb. Ten. 142. 145.

§ 23. A collateral warranty is not prohibited by the ſtatute *de Donis*; for, as that ſtatute only declared that the will of the donor ſhould be obſerved, the judges would not extend it to collaterals, who did not take by the gift, and who, therefore, could not be forbidden from barring by their warranty.

Sect. 708. to 716.

Thus, *Littleton* ſays, that if a tenant in tail hath iſſue three ſons, and diſcontinues the eſtate tail in fee, and the ſecond ſon releaſes by deed to the diſcontinuee with warranty, and dies without iſſue, this warranty will rebut

rebut the eldeſt ſon, and prevent him from recovering the eſtate tail, becauſe it is a collateral warranty; for the eldeſt ſon cannot make a title to the ſecond ſon under the intail.

§ 24. With reſpect to remainders expectant on eſtates tail, there is nothing in the ſtatute *de Donis*, which either, directly or indirectly, reſtrains the tenant in tail from barring them by his warranty; and, therefore, the operation of a warranty in rebutting remainder men, expectant upon eſtates tail, remains as it was before the ſtatute; ſo that ſuch warranty will now bar them without aſſets.

And all Remainders expectant thereon. Sym's Caſe, 8 Rep. 51 *b.*

§ 25. In the caſe of *Bole* v. *Horton*, which has been already ſtated, Lord Chief Juſtice *Vaughan* lays it down as clear law, that the ſtatute *de Donis* does not reſtrain the warranty of tenant in tail from barring remainder-men, by the deſcent of the warranty on them. 1ſt, Becauſe the miſchief complained of in this ſtatute was, that the iſſue in tail was diſinherited. But the warranty of the donee in tail deſcending upon the remainder-man, who claims by purchaſe from the donor, and not by deſcent from the donee in tail, could be no diſinheriting of the iſſue of the donee. 2d, The ſtatute did not provide againſt inconveniencies, or miſchiefs which did not exiſt at the time of making the ſtatute. Now, when the ſtatute was made, there could be no remainder in tail, becauſe all eſtates which are eſtates tail ſince the ſtatute, were fee-ſimple conditional before the ſtatute, upon which a remainder could not be limited.

Ante f. 21.

§ 27. This

§ 26. This opinion was extrajudicial, as that point was not before the court; but I cannot find that it was ever contradicted. And it is now held, that *if* *A.* be tenant in tail, remainder to *B.* his next brother in tail, (which is a very common caſe ariſing upon almoſt every marriage ſettlement), and *A.* being in poſſeſſion, makes a feoffment with warranty, or levies a fine, (in which there is always a warranty), of the eſtate tail, and dies without iſſue, this warranty being collateral to *B.*, who claims by way of remainder, will therefore bar him without aſſets.

Rob. Gav. 125 note. 1 Inſt. 373 *b.* n. 2.

§ 27. By the ſtatute 11 *Hen.* 7. c. 20., it is enacted, that in caſe a wife, after the death of her huſband, ſhall alone, or with any after taken huſband, alien with warranty, any lands which ſhe holds in dower, or of which ſhe is ſeiſed in tail, of the gift of her former huſband, or of any of his anceſtors, ſuch warranty ſhall be void.

Statute 11 Hen. 7. c. 20.

Lincoln College Caſe, 3 Rep. 58.

For the conſtruction of this ſtatute, vide Title 36. Recoveries.

§ 28. By the ſtatute 4 *Ann*, c. 16. ſ. 21., it is enacted, that all warranties made after the firſt day of *Trinity* Term 1706, by any tenant for life of any lands, tenements, or hereditaments, the ſame deſcending or coming to any perſon in reverſion or remainder, ſhall be void and of none effect: and, likewiſe, all collateral warranties which ſhall be made after the ſame day of any lands, tenements, or hereditaments, by any anceſtor-

Statute 4 Ann, c. 16.

anceſtor who has no eſtate of inheritance in poſſeſſion in the ſame, ſhall be void againſt his heir.

It is obſervable, that this ſtatute does not extend to the alienation of a tenant in tail in poſſeſſion, and therefore his warranty is not reſtrained by this act. Ante f. 22. 25.

§ 29. A warranty may be deſtroyed by the attainder of the warrantor, for, in that caſe, he becomes incapable of tranſmitting any thing by deſcent. How a Warranty may be deſtroyed. Lit. f. 745. 747.

TITLE

TITLE XXXII.

DEED.

CHAP. V.

The ſame Subject continued.—Covenants and Concluſion.

§ 1. *Of Covenants*
5. *No technical Words neceſſary.*
8. *Implied Covenants.*
12. *Joint and ſeveral Covenants.*
16. *Covenants real.*
17. *Bind all claiming under the Grantee.*
30. *And all claiming under the Grantor.*
37. *Covenants for the Title to Lands.*
46. *Uſually reſtrained to the Acts of the Vendor.*
§ 50. *Who are held to claim through the Vendor.*
52. *Or by his Default.*
53. *Covenants for Production of Title Deeds.*
54. *What Covenants where the Title is defective.*
55. *Remedies under theſe Covenants.*
65. *Who are bound to enter into theſe Covenants.*
70. *Concluſion.*

Section 1.

Of Covenants. THE ſeventh part of a deed is the covenant, which is an engagement or agreement by which one perſon obliges himſelf to do ſomething beneficial to, or to abſtain from ſomething, which, if done, might be prejudicial to another. And a great variety of agreements of this kind have been introduced into modern deeds.

Plowd. 138. 1 Vent. 26. § 2. A covenant is generally an agreement to do ſomething *in futuro*, and differs from the caſe where an agreement refers to a thing which is not to be done by the perſon of any; but to a thing to be executed

in itself. And where an agreement terminates in itself, it is not properly a covenant, but a defeazance. A covenant may however be executed, namely, that a thing *is* done already. Shep. T. 162.

§ 3. A covenant can only be created by deed, but it may as well be by deed poll, as by indenture; for the covenantee's acceptance of the deed delivered to him is such an assent to the agreement, as will render it binding on him. But in the case of a deed poll the party must be named in the deed. 1 Roll. Ab. 517. Fitz. N. B. 145. Green v. Horne, 1 Salk. 197.

§ 4. Where lands are conveyed by indenture to two persons and one of them does not seal the deed, yet if he enters upon the land, and accepts of the deed in other matters, he will be bound by the covenants contained in it. 1 Inst. 231 *a*.

§ 5. The law has not appropriated any particular form of words to the creation of a covenant; and therefore any words will be sufficient for that purpose, which shew the intention of the parties to enter into a covenant. No technical Words necessary. 1 Ves. R. 516.

§ 6. In articles of agreement reciting an intended marriage, it was covenanted that in consideration of the lady's portion, a jointure should be settled on her: and the conclusion was in these words—"And it is "hereby agreed that a fine shall be levied to secure "the payment of the said portion." It was resolved, that these words created a covenant to levy a fine: for, Hollis v. Carr, 2 Mod. 86. Harwood v. Hilliard, 2 Mod. 268.

wherever there is an agreement under hand and seal, covenant lies.

Williamson v. Codrington, 1 Ves. R. 511.

§ 7. Where a person obliged himself to warrant and for ever defend the lands conveyed: It was held by Lord *Hardwicke* not to be a warranty, but a covenant.

Implied Covenants.

4 Rep. 80 *b.* 5 Rep. 17 *a.*

§ 8. There are some words, which, when used in particular contracts, will create a covenant. Thus, if a person makes a lease for years by the words *concessi* or *demisi*, grant or demise, they will create a covenant for quiet enjoyment of the lands demised: and, if the lessee be evicted by the lessor, or by any person claiming a lawful title to the land, he may bring an action thereupon.

Giles v. Hooper, Carth. 135.

§ 9. So, if a lease for years be made, *reserving* or *yielding and paying* a certain rent; these words will create a covenant for payment of the rent.

3 Burr. R. 1639. Amb. R. 250.

§ 10. Lord *Mansfield* has said, that the distinction between implied covenants by operation of law, and express covenants, is, that express covenants are taken more strictly: for a man may, without consideration, enter into an express covenant, under hand and seal.

Noke's Case, 4 Rep. 80 *b.* 1 Mod. 113. 1 Vesey 101.

§ 11. An express covenant will qualify the generality of an implied covenant, and restrain it; so that it shall not extend farther than the express covenant.

Joint and several Covenants.

§ 12. Where several persons enter into a covenant, they may either bind themselves altogether, or else they

they may bind each of themſelves ſeverally: from whence ariſes a diſtinction between joint and ſeveral covenants. A covenant of this kind may alſo be both joint and ſeveral.

§ 13. If two leſſees covenant jointly and ſeverally at the beginning of a leaſe, theſe words extend to all their ſubſequent covenants, notwithſtanding the intervention of covenants on the part of the leſſor.

§ 14. In a leaſe of coal-mines made by the Duke of *Northumberland* to *G. Errington* and *John Ward*, there was a ſtring of covenants introduced by theſe words, "And the ſaid *G. Errington* and *J. Ward* "for themſelves jointly and ſeverally, and for their "ſeveral and reſpective heirs, *&c.*" Then came a proviſo in theſe words, "And it was thereby declared "by and between the ſaid parties, and the ſaid Duke "did thereby covenant that it ſhould be lawful for "the leſſees to ſell a certain quantity of a particular "ſort of coals, *they the ſaid G. Errington and J. "Ward paying and accounting to the Duke for the "ſame.*" An action was brought by the Duke againſt the executors of *G. Errington*, upon theſe words: and the queſtion was, whether they amounted to a ſeveral covenant.

Duke of N. v. Errington, 5 Term R. 522.

It was determined, that the general words at the beginning of the covenants by the leſſees—"jointly "and ſeverally in manner following,"—extended to all their ſubſequent covenants; which were, therefore, all joint and ſeveral.

Slingſby's Caſe, 5 Rep. 18. Jenk. 262.

§ 15. Where a perſon covenants with two or more perſons, and with each of them, if each of the covenantees takes a ſeveral intereſt or eſtate, the covenant is ſeveral. But, if the covenantees take a joint intereſt in the ſubject matter of the covenant, it is a joint covenant: as, if a man by indenture demiſes, to *A. Black-acre*, to *B. White-acre*, to *C. Green-acre*, and covenants with them and every of them, that he is lawful owner of all the ſaid acres; in that caſe, as the intereſts are ſeveral and diſtinct, the words "*every of* "*them*," will make the covenant ſeveral. But, if the three acres had been demiſed to them jointly, then the words "*every of them*" would have have been void: for a man, by his covenant (unleſs in reſpect of ſeveral intereſts) cannot make it firſt joint and then ſeveral, by means of the words "*every of them.*" For, although ſeveral perſons may bind themſelves and every of them, and ſo the obligation ſhall be joint or ſeveral at the election of the obligee; yet a man cannot bind himſelf to three and to each of them, to make it joint or ſeveral, at the election of ſeveral perſons, for one and the ſame cauſe: for the court would be in doubt, for which of them to give judgement; alſo, the covenantor would be ſeveral times charged with one and the ſame thing: and therefore the words, "*and every of them,*" are in ſuch caſe of no effect, and do not ſever the joint cauſe of action.

Johnſon v. Wilſon, Willes R. 248.

Covenants real. 1 Inſt. 384 *b.* Law of Cov. c. 11. Shep. T. 161.

§ 16. Covenants are divided into real and perſonal. Covenants real are thoſe which have for their object ſomething annexed to, or inherent in, or connected with, land, or other real property; and, as ſuch covenants

nants descend to the heir, and are transferred to the purchaser of the land by the conveyance, they are said to run with the land. Congham v. King, Cro. Car. 221.

§ 17. In consequence of this doctrine, where a covenant is entered into by the grantee or lessee, which relates to the land, it will bind not only such grantee or lessee, but also the assignee of such grantee or lessee; and the grantor or lessor, or their heirs, may at any time bring an action on such covenant. Bind all claiming under the Grantee.

§ 18. It was resolved in 25 *Eliz.* that, where a covenant extends to a thing *in esse*, parcel of the demise, the thing to be done by force of the covenant is *quodammodo* annexed and appurtenant to the thing demised, and shall go with the land and bind the assignee; though he be not bound by express words. But, when the covenant extends to a thing which is not in being at the time of the demise made, it cannot be appurtenant or annexed to a thing which does not exist. Spencer's Case, 5 Rep. 16 *a.*

§ 19. Where, in a lease for years, the lessee covenanted with the lessor, his executors and administrators, to repair; and the lessor died: It was held that his heir might bring an action on the covenant; for it was annexed to the land, and went to the heir, though he was not named. And it appeared that it was intended to continue after the death of the lessor, his executor being named. Lougher v. Williams, 2 Lev. 92.

§ 20. But, where the lessor was only tenant for life, it was held, that his heir was not entitled to the Bradnell v. Roberts, 2 Wils. R. 143.

benefit of covenants made with him; becauſe the leaſe determined by his death.

§ 21. Although the aſſignee be liable to the covenants which run with the land, yet that circumſtance will not diſcharge the aſſignor, who will ſtill continue liable to them.

Barnard v. Godſcall, Cro. Jac. 309.

§ 22. An action of covenant was brought by the leſſor of a houſe againſt the leſſee, for not repairing it after warning given. The defendant pleaded that, long before that warning, he had aſſigned over his term to *J. S.*, from whom the plaintiff afterwards received the rent.

It was determined, that the action againſt the leſſee was maintainable, notwithſtanding the aſſignment, and acceptance of rent,

§ 23. If the tenant be not aſſignee of the whole term, he is then in fact only an undertenant, and is not liable to an action on the covenant,

Holford v. Hatch, Doug. 182.

§ 24. An action of covenant was brought for rent in arrear againſt the defendant, as aſſignee of one *Saunders*. On the trial it appeared, that the defendant was in poſſeſſion of the premiſes during the time when the rent in arrear became due; but that, by the deed under which he held, they were conveyed to him by *Saunders* for a day or two leſs than the original term. For the plaintiff it was contended, that, the covenant for rent being one of thoſe which

runs

runs with the land, every perſon, who takes under the original leaſe, is liable to it. To this purpoſe the defendant, although he had not ſtrictly taken the whole of the leſſee's intereſt, in point of duration, was to be conſidered as his aſſignee. A deviſee, an executor, an aſſignee under the bankrupt laws, or one who purchaſes a term from the ſheriff under an execution, are aſſignees in law to the effect of being liable to covenants for rent, *&c.*; although the transfer to them does not amount to a forfeiture under a covenant not to aſſign. The landlord is entitled to look for the rent to the perſon in poſſeſſion, and ought not to be driven to the neceſſity of finding out the original leſſee, and bringing his action againſt him.

On the other ſide it was inſiſted, that there was not a better known diſtinction in the law, than that between an aſſignee and an undertenant. Only aſſignees of the whole term, whether by actual aſſignment, or by deviſe, ſale under an execution, *&c.* are liable to the covenants for rent, *&c.*: for, if there is a reverſion of a day by the immediate leſſee, there is no privity between the undertenant and the firſt leſſor.

Lord *Mansfield.*—This is an action of covenant by a leſſor againſt an under-leſſee; and the ſingle queſtion is, whether the action can be maintained againſt him, as being ſubſtantially an aſſignee. For ſome time we have had great doubts; we have beſtowed a great deal of conſideration on the ſubject, and looked carefully into the books: and it is clearly ſettled, (and is agreeable to the text of *Littleton*,) that the action

cannot be maintained, unleſs againſt an aſſignee of the whole term.

Tit. 13. c. 2. f. 55.

§ 25. It has been ſtated in a former title, that, upon the diſſolution of the monaſteries by *Hen.* 8., moſt of their eſtates were granted to private perſons; who could not take advantage of the conditions contained in the leaſes that had been formerly made of thoſe eſtates, which produced the ſtatute 32 *Hen.* 8. c. 34. This act extends to covenants as well as to conditions; it being thereby enacted that the aſſignees of reverſions ſhall have ſuch like and the ſame advantage, &c. by action only, for not performing the covenants contained in the ſaid leaſes, as the leſſors or grantors themſelves, or their heirs or ſucceſſors, might have had.

Spencer's Caſe, 5 Rep. 18 *a.* 1 Inſt. 215 *b.*

§ 26. It was reſolved in 25 *Eliz.*, that this act extends only to covenants, which touch or concern the thing demiſed, and not to collateral covenants; and, therefore, the intent of the ſtatute was not to transfer any privity of contract, but to annex the covenants, touching or concerning the land demiſed, to the reverſion; ſo that they might paſs as annexed and incident to the reverſion.

Thurſby v. Plant, 1 Saund. 237. *a.* 3. 4. 5.

Webb v. Ruſſell, 3 Term R. 393.

§ 27. In a modern caſe it was reſolved by the Court of King's Bench, that, if a mortgagor and mortgagee make a leaſe, in which the covenants for the rent and repairs are only with the mortgagor and his aſſigns, the aſſignee of the mortgagor cannot maintain an action for the breach of theſe covenants; becauſe they

are

are collateral to his grantor's intereſt in the land, and therefore do not run with it. And Mr. Serjeant *Shepherd*, in arguing this caſe, ſtated that there were three relations at common law, which might exiſt between the leſſor and leſſee, and their reſpective aſſignees. Firſt, privity of contract; which is created by the contract itſelf, and ſubſiſts for ever between the leſſor and leſſee. Secondly, privity of eſtate; which ſubſiſts between the leſſee, or his aſſignee in poſſeſſion of the eſtate, and the aſſignee of the reverſioner. And, thirdly, privity of contract and eſtate; which exiſts, where both the term and reverſion remain in the original covenantors. The ſtatute 32 *Hen.* 8. ſeems to have created a fourth relation; a privity of contract in reſpect of the eſtate, as between the aſſignees of the reverſion, and the leſſees or their aſſignees. The ſtatute annexes, or rather creates, a privity of contract between thoſe, who have privity of eſtate; and, when the one fails, the other fails with it.

It was alſo reſolved in this caſe, that, if a tenant for a term of years leaſe for a leſs term, and aſſign his reverſion, and the aſſignee take a conveyance of the fee, by which his former reverſionary intereſt is merged; the covenants incident to that reverſionary intereſt are thereby extinguiſhed.

§ 28. Lord *Coke* obſerves, that an aſſignee of part of the eſtate of the reverſion may take advantage of a condition, and conſequently of a covenant: as, where a reverſion in fee is granted for life, the grantee ſhall 1 Inſt. 215 a.

ſhall have the benefit of the covenants. But a grantee of part of the reverſion ſhall not take advantage of a covenant; and therefore, if a reverſion conſiſts of three acres, and two of the acres are granted, the covenants are deſtroyed.

1 Inſt. 215 *b.* § 29. His lordſhip alſo obſerves, that, if the reverſion is conveyed by means of the ſtatute of uſes, the perſon to whom it is thus conveyed is a ſufficient aſſignee within the ſtatute; becauſe he comes in by the act and limitation of the party, although he is in in the *poſt*. But ſuch, as come in by act in law, as the lord by eſcheat, ſhall not derive any benefit from the ſtatute.

And all claiming under the Grantor. 1 Inſt. 384 *a.* § 30. As aſſignees of grantees or leſſees are bound by all covenants real, annexed to the eſtate granted or leaſed, and which run with the land; ſo are they entitled to the benefit of all ſuch covenants as are entered into by the grantors or leſſors, and may maintain an action on them.

5 Rep. 17 *a.* § 31. Thus, in Spencer's caſe it was reſolved, that, if a perſon made a leaſe for years by the words, "grant" or "demiſe," which imply a covenant for quiet enjoyment, and the aſſignee of the leſſee was evicted, he ſhould have a writ of covenant. For it was but reaſonable he ſhould have ſuch benefit of the demiſe, as the original leſſee might have had: and the leſſor had no other prejudice than that to which his ſpecial contract with the original leſſee bound him.

§ 32. A court

§ 32. A court of equity will give its aſſiſtance to an aſſignee againſt all perſons claiming under the grantor of an eſtate, to procure him the benefit of the covenants contained in the grant, which run with the thing granted.

§ 33. *A.* and *K.* his wife, being ſeiſed in right of the ſaid *K.* of two pieces of ground, by indenture *25 January* 1622, granted a watercourſe to one *J. H.* and his heirs, through the ſaid two pieces of ground; and by the deed did covenant for them, their heirs and aſſigns, from time to time to cleanſe the ſame; and that all fines and recoveries, levied and ſuffered, or to be levied and ſuffered, of the ſaid grounds ſhould be and enure to the ſtrengthening and confirming the ſaid watercourſe according to the ſaid grant: and, afterwards, a recovery was had, and a deed executed, declaring the uſes to be as aforeſaid. The watercourſe, by meſne aſſignments, came to the plaintiff, and the ſaid two pieces of ground to the defendant, who built on the ſame, and much heightened the ground that lay over the watercourſe, and made it much more chargeable and inconvenient to repair; and, as it was alledged (and in part proved), the building had much obſtructed the watercourſe; ſo the bill was for eſtabliſhing the enjoyment of the watercourſe, and that the defendant, and all claiming under him, might from time to time cleanſe the ſame, according to the covenant. It was objected, that the covenant, being perſonal, was not at all ſtrengthened by the recovery; and that the plaintiff and thoſe under whom he claimed, being ſenſible of it,

Holmes v. Buckley, 1 Ab. Eq. 27.

it, had for forty years cleanſed the ſame at their own charges. But the court was of opinion, that this was a covenant which run with the land, and was made good by the recovery, and that, though the plaintiff had cleanſed the ſame at his own charge, whilſt it was eaſy to be done; yet, ſince the right was plain upon the deed, and the cleanſing made chargeable by the building, it was reaſonable the defendant ſhould do it; and decreed accordingly.

§ 34. By the ſtat. 32 *Hen.* 8. c. 34. it is farther enacted, that all feoffees and grantees of any lordſhips or hereditaments for years, life or lives, their executors, adminiſtrators, and aſſigns, ſhall have the like action and remedy againſt all perſons, having reverſions of ſuch lordſhips or hereditaments, for any covenants contained in their leaſes, as they might have had againſt the leſſors or grantors, their heirs and ſucceſſors.

§ 35. Where the whole of a term is aſſigned, and no reverſion is left in the aſſignor, the aſſignee will be entitled to the benefit of the covenants contained in the original leaſe; and may bring an action on them againſt the aſſignee of the leſſor.

Palmer v. Edwards, Doug. 186 *n.*

§ 36. An action of covenant was brought by the plaintiff, as aſſignee of a term, againſt the defendant as aſſignee of the leſſor, for not providing proper timber for repairs.

It

It was objected that, when the original leſſee aſſigned over the term, the rent was reſerved to ſuch leſſee and not to the leſſor; and that the covenants, in the aſſignment by the original leſſee, were not the ſame with thoſe in the original leaſe.

On the other ſide, it was contended that, wherever the whole intereſt is conveyed, it is an aſſignment; and that, in ſuch a caſe, the aſſignee ſtands exactly in the place of the leſſee, and is entitled to the benefit of all the covenants on the part of the leſſor.

The court was of this opinion, and gave judgment accordingly.

Covenants for the Title to Lands.

37. In all ancient feoffments, the feoffor entered into a general warranty with the feoffee, for the title to the lands conveyed. But warranties have been long ſince diſuſed, and a ſet of covenants for ſecuring the title have been ſubſtituted in their ſtead; which are now generally inſerted in all conveyances, as being more beneficial in ſome reſpect to the grantees, and affording a more eaſy remedy, in caſe of a defect in the title, than could be obtained under the ancient warranty.

§ 38. By the firſt of theſe, the grantor covenants for himſelf, his heirs, executors, and adminiſtrators, with the grantee, his heirs and aſſigns, that he, the grantor, is lawfully ſeiſed in fee-ſimple of the premiſes conveyed.

By

By the ſecond, he covenants that he has a good right and full power to convey the ſame.

By the third, he covenants that the grantee, his heirs and aſſigns, ſhall have, hold, and enjoy the premiſes granted, without the eviction or diſturbance of any perſon whatever.

Where lands are conveyed to uſes, the words are, that the eſtates conveyed ſhall be and remain to the uſes thereby limited, without any eviction, *&c.*

By the fourth, the lands are declared to be free from all incumbrances whatever. And, by the fifth, the grantor binds himſelf and his heirs to make all ſuch farther aſſurances of the lands, as ſhall be lawfully and reaſonably required by the grantee or his heirs, or their counſel.

§ 39. Upon the conſtruction of theſe covenants, the ſecond of them has been held to be of the ſame import as the firſt: for, if the vendor be ſeiſed in fee, he has power to convey. But the converſe of this propoſition does not hold; for a perſon, not actually ſeiſed in fee, may have power to convey. Thus, where a tenant in tail conveys to a perſon, to make him tenant to the præcipe, in order that a common recovery may be ſuffered to the uſe of the purchaſer in fee; or, where a perſon conveys under a power; the covenant is, that the grantor hath good right to convey.

3 Lev. 46.

§ 40. As

§ 40. As to the covenant for quiet enjoyment it was formerly held, that it extended to all eviction whatever. Thus, it was reſolved in 15 and 16 *Eliz.*, that where a perſon made a leaſe for a term of years, and covenanted, that the leſſee ſhould enjoy the premiſes during the term, without the eviction or interruption of any perſon, this extended to a tortious eviction.

Mountford v. Cateſby, Dyer 328 *a.*

§ 41. This doctrine has, however, been long exploded: and it has been ſettled, that the law will never adjudge a perſon to covenant againſt the wrongful acts of ſtrangers, unleſs his covenant is expreſs to that purpoſe: for the law itſelf defends every one againſt wrong. And, therefore, though a perſon ſhould covenant in the moſt general terms for the title to lands, yet ſuch covenant will not be held to extend to tortious entries: for, if a purchaſer is tortiouſly evicted or diſturbed, he has his remedy at law; and, if he is legally evicted he has his action on the covenant. Whereas, if general covenants for a title ſhould be conſtrued to extend to tortious evictions, a way might be opened for ſecret practices and combinations between a purchaſer and ſtrangers; that the purchaſer might recover damages from the covenantors. This doctrine has been confirmed in the following modern caſe.

Vide 2 Saund. R. 178 *a.* n. 8. 181 *a.* n. 10.

§ 42. A perſon conveyed certain lands in the province of *New York*, in *North America*, to a purchaſer in conſideration of 1200 *l.*; and covenanted that the purchaſer ſhould enjoy the premiſes without the let, trouble,

Dudley v. Folliott, 3 Term R. 584.

trouble, hindrance, &c. of the vendor or his heirs, and of and from all and every other perſon and perſons whomſoever. The States of *America* ſeized the lands for an act done previous to the conveyance. An action was brought in the Court of King's Bench at *Weſtminſter* upon this covenant: and, upon a demurrer, the court was of opinion, that the action did not lie; for even a general warranty, which is conceived in terms more general than this covenant, has been reſtrained to lawful interruptions.

Noble v. Smith, 1 Hen. Black. R. 34.

§ 43. But, where a perſon covenants to ſave the purchaſer harmleſs from all acts of a particular perſon, there the vendor is bound to defend the purchaſer againſt the entry of that perſon, whether by title or not.

Foſter v. Mapes, Cro. Eliz. 212. Hob. 35.

§ 44. Theſe covenants are real, and paſs to all the aſſignees of the land, who may maintain actions upon them, againſt the vendor and his heirs. And *ceſtuis que uſe* are grantees within the ſtatute 32 *Hen.* 8. c. 34., and are, therefore, entitled to the benefit of all covenants entered into by perſons ſelling lands, for ſecuring the title of ſuch lands.

Midlemore v. Goodall, 1 Roll Ab. 521. Deriſley v. Cuſtance, 4 Term R. 75.

§ 45. *Rachael Boyes* and her ſon conveyed a copyhold eſtate by leaſe and releaſe to a mortgagee, and covenanted for farther aſſurance. The ſon died, and the mortgagee filed his bill againſt the cuſtomary heir of the ſon, who was an infant, praying that he might be decreed to ſurrender the eſtate to the plaintiff.

Spencer v. Boyes, 4 Veſ. Jun. 370.

The

The Maſter of the Rolls ſaid, he was clearly of opinion, that this covenant was a contract for a valuable conſideration affecting the land, and would affect the heir. And, by the decree, it was declared, that the covenant in the mortgage deed bound the land deſcended to the defendant.

§ 46. Covenants for the title have been reſtrained for upwards of a century to the acts of the vendor and his anceſtors, and of all perſons claiming under them: and, although where covenants are ſeveral and of diſtinct natures, it has been held, that reſtrictive words annexed to one of the covenants, will not be applied to the other covenants; yet, where all the covenants have the ſame object, and reſtrictive words are inſerted in the firſt of them, they will be conſtrued ſo as to extend to all the others.

Uſually reſtrained to the Acts of the Vendor.

Gainsford v. Griffith, 1 Saund. 58.

§ 47. In a conveyance of an eſtate in fee, the vendor, after warranting the lands to the vendee and his heirs, againſt himſelf and his heirs, covenanted that, notwithſtanding any act done by him to the contrary, he was ſeiſed in fee, &c. *and that he had good right, full power, and lawful authority,* to convey and aſſure the ſame to the vendee, and his heirs and aſſigns, in manner aforeſaid. The vendee was evicted by a perſon, claiming under a title paramount to that of the vendor. An action of covenant was brought by the vendee againſt the repreſentatives of the vendor. And it was contended on the part of the plaintiff, that the words "*good right, full power,* &c." extended to all perſons whatever, and, conſequently, that the vendee was entitled

Browning v. Wright, 2 Boſanq. & Pull. 13.

titled to recover his purchaſe-money. But it was determined, that theſe words were either a part of the preceding ſpecial covenants, or, if not, that they were qualified by all the other ſpecial covenants, which reſtrained the covenants to the acts of the vendor and his heirs, and thoſe claiming under him.

§ 48. Where the vendor has himſelf purchaſed the eſtate, the covenants are reſtrained to his own acts. The principle of this doctrine is thus ably ſtated by Mr. *Fearne:*

Poſth. Works, 110.

" Regularly, a vendor who purchaſes lands himſelf, " with proper covenants from thoſe who convey to " him, cannot reaſonably be required to covenant fur- " ther than againſt himſelf, and thoſe claiming under " him. This is a practice founded in reaſon, where " the vendee obtains the full benefit of all the cove- " nants in the conveyance to the vendor, to the ſame " extent as his vendor had them, by obtaining the " poſſeſſion of the deeds containing thoſe covenants. " When the vendor has parted with his means of " claim or remedy againſt his grantor, for breach of " his covenants, and transferred them to the pur- " chaſer, by delivery of the deeds, and ſuch vendee " comes into the vendor's place in that reſpect, by the " acquiſition of ſuch deeds, it would be unreaſonable " that the vendor ſhould make *himſelf liable* for any " ſuch breach. He, by departing with the means of " remedy or compenſation, muſt be underſtood to " have diſcharged himſelf from, and the vendee, by " accepting thoſe means, to have taken upon himſelf " the

" the peril or riſk of ſuch breach, and the duty of " enforcing its remedy or compenſation."

§ 49. There are ſome exceptions to this rule: for, where the title-deeds are not delivered to the vendee, the covenants ſhould extend to the acts of the perſon, from whom the vendor purchaſed the eſtate. Thus, Mr. *Fearne*, in the opinion of which, a part has been tranſcribed in the laſt ſection, proceeds in theſe words: " But this principle, I think, does not apply to thoſe " caſes where the vendor does not depart with, nor " the vendee acquire, the deed containing the cove- " nants for the title, againſt the acts of ſuch grantors. " Whilſt the vendor retains in his own hands the im- " mediate means of indemnity, which he thought " proper to require of his grantor, it ſeems but rea- " ſonable that he ſhould engage for the like indemnity " to his own vendee, and rely upon the indemnity he " has obtained for his own counter ſecurity. It is not, " I think, ſufficient to ſay, that the covenant to pro- " duce his purchaſe-deeds will entitle the vendee to " the benefit thereof when produced. Such a covenant " cannot inſure the production of them, which may be " prevented by accidents, for which the vendor, in " whoſe cuſtody the deeds are, ought to be the ſufferer, " rather than the vendee; who, by not having ſuch " poſſeſſion, could not in any degree be acceſſary to " the occaſion of their loſs, or by any means or care " have prevented it. There ſeems more reaſon, on " the other ſide, to ſay, it is ſufficient for the vendor, " that, when called upon by the covenants entered " into by him to the vendee for enjoyment, *&c.* he

" has his remedy over to the ſame extent upon his " grantors, of which, as he retains the means in his " cuſtody, he is bound to look to the preſervation of " thoſe means, and liable to the reſort to, and due " enforcement of them, and to bear the conſequence " of their loſs.

" Upon the whole, therefore, the preſent caſe does " not appear to me to fall within the general rule, " where the vendee acquires the cuſtody or poſſeſſion " of the vendor's purchaſe-deeds; and that it is but " reaſonable that a vendor, retaining in his own cuſ- " tody the only means of indemnity againſt the acts " of his grantors, ſhould engage to indemnify his " vendee to the like extent. He cannot, I think, " fairly object to his vendee's requiring an indemnity " againſt the acts of the ſame perſons, and to the " ſame extent, as he himſelf required; nor, whilſt " he retains the means of enforcing ſuch indemnity, " deny his reliance upon, or refuſe to ſubject himſelf " to, a reſort to thoſe means. Withholding his own " indemnity from the poſſeſſion of the vendee, it is " but fair he ſhould give him the poſſeſſion of an " equivalent one."

Who are held to claim through the Vendor.

§ 50. With reſpect to the perſons who may be ſaid to claim by or through the vendor, and to whoſe acts all modern covenants extend, it was determined by the Court of King's Bench, in a modern caſe, that a perſon, whoſe title was derived under a deed of revocation and appointment of new uſes, muſt be conſidered

ſidered as a perſon claiming by or through the appointor.

§ 51. Sir *John* and Lady *Aſtley* levied a fine of Lady *Aſtley*'s eſtate, to the uſe of Sir *John* for life, remainder over, with power to Sir *John* to make leaſes, with a joint power of revocation. They afterwards revoked the uſes, and appointed new ones, to Lady *Aſtley* for life, remainder over; remainder to Lady *Tankerville*. Sir *John Aſtley* afterwards made a leaſe not warranted by his power, and covenanted that the leſſee ſhould enjoy the premiſes without any interruption from him, or any perſon claiming under him. When Lord *Tankerville*'s eſtate became veſted in poſſeſſion, he took advantage of the defect in the leaſe, and evicted the leſſee, who brought his action of covenant againſt Sir *John Aſtley*'s executors.

Hurd v. Fletcher, Doug. 43.

The queſtion was, whether Lord *Tankerville* claimed under Sir *John Aſtley*, or only under Lady *Aſtley*. Lord *Mansfield* ſaid, that juſtice was ſtrongly with the plaintiff. That it was true, a fine and a deed to lead the uſes, were to be conſidered as one conveyance; but that, as Sir *John Aſtley* was a neceſſary party to the ſecond declaration of uſes, by which the eſtate was limited to Lord *Tankerville*, his Lordſhip certainly claimed under him, within the meaning of this covenant. That, undoubtedly, Sir *John* had covenanted againſt his own acts, and that the new limitations were created by one of his acts.

Vide Butler v. Swinnerton, Palm. 339.

Or by his Default.

Howes v Bruſhfield, 3 Eaſt. R. 491.

§ 52. Where a perſon conveyed an eſtate, and covenanted with the vendee for quiet enjoyment, without any eviction or interruption by the vendor, or any perſon claiming under him, or by, through, or with, his, their, or any of their acts, means, default, or procurement, and a quit rent was payable out of the lands, which became due before the vendor came into poſſeſſion, but was in arrear at the time of the ſale, it was held to be a breach of the covenant; and Lord *Ellenborough* ſaid, that if it were in arrear in the vendor's lifetime, it was a conſequence of law that it was by his default, that is, by his default in reſpect of the party with whom he covenanted, to leave the eſtate unincumbered.

Covenants for Production of Title-Deeds.

Fearne Id. 114.

Napper v. Allington, 1 Ab. Eq. 166.

§ 53. Where the title-deeds of an eſtate are retained by the vendor, which frequently happens, either becauſe they relate to a larger eſtate than that which is ſold, or for other reaſons, the purchaſer is entitled to a covenant for the production of them. And this covenant, being real, will run with the land, and extend to all future purchaſers of it. But, if the deed, containing ſuch covenant, be not delivered to a future purchaſer, then he will be entitled to a new covenant from his vendor for the production of the title-deeds.

What Covenants where the Title is defective.

1 Inſt. 384 *a*. *n.* 1.

§ 54. Where there is a defect in the title, the purchaſer has a right to covenants againſt all perſons, claiming a lawful title to the eſtate. And Mr. *Butler* has juſtly obſerved, that, where a purchaſer conſents

to

to take a defective title, relying for his ſecurity on the vendor's covenant, this ſhould be particularly mentioned to be the agreement of the parties: for, otherwiſe, as the defect was known, it may be contended, that the covenants for the title ſhould not extend to warrant it againſt ſuch particular defect.

§ 55. Where a purchaſer, whoſe title is ſecured by covenants of this kind, is evicted by any perſon claiming under the vendor, or any of his anceſtors, the purchaſer may maintain an action at law upon the covenants, for the reſtoration of his purchaſe-money. And, where a defect is diſcovered in the title, which may be ſupplied by the vendor, he will be compelled, in equity, to do whatever is neceſſary to amend ſuch defect. Remedies under theſe Covenants.

§ 56. Where a huſband covenants that his wife ſhall join with him in levying a fine, the Court of Chancery will decree the huſband to do it; becauſe it muſt be preſumed, that the huſband has firſt obtained his wife's conſent for that purpoſe: and the intereſt in ſuch covenant has been taken to be an inheritance deſcending to the heir of the covenantee. But Mr. *Cox* obſerves, that if it can be made appear to have been impoſſible for the huſband to procure the concurrence of his wife, it cannot be ſuppoſed that the court would decree an impoſſibility; eſpecially, if the huſband offers to return all the money, with intereſt and coſts, and to anſwer all the damages. 3 P. W. 189. Note (B.)

1 Inſt. 384 *a.* *n.* 1.

§ 57. Where there is any fraud or concealment practiſed by the vendor, the purchaſer may bring an action on the caſe, in the nature of an action of deceit. But Mr. *Butler* obſerves, that a judgment, obtained after the death of the vendor, in an action of this kind, can only charge his perſonal property as a ſimple contract debt, and will not, except under very particular circumſtances, affect his real aſſets. A bill in Chancery will, therefore, in moſt caſes, be found a better remedy: it will lead to a better diſcovery of the concealment, and the circumſtances attending it; and may, in ſome caſes, enable the court to create a truſt in favour of the injured purchaſer.

Treat. of Eq. B. 1. c. 5. ſ. 8.

§ 58. Mr. *Fonblanque* obſerves, that the circumſtance of a court of equity requiring the vendor, in ſuch caſe, to be affected with ſuch fraudulent concealment, raiſes a ſtrong preſumption, that, without proof of it, the purchaſer could not have been relieved. And, in the caſe of *Harding* v. *Nelthorpe*, ſuch proof was required, and an iſſue was directed, to aſcertain whether the vendor did or did not know of the incumbrance, which affected the land, but to which his covenant did not extend.

Nelſ. Cha. Rep. 118. 2 Ab. Eq. 678. pl. 1.

§ 59. The court of chancery will not, however, compel the performance of a covenant for farther aſſurance, unleſs the tranſaction be free from all objection.

Johnſon v. Nott. 1 Vern. 271.

§ 60. An heir ſold the reverſion of a houſe, in the lifetime of his father, at an under value; but, being only

only tenant in tail, he covenanted to make farther aſſurance. Upon a bill in Chancery for a ſpecific performance of this covenant, the court refuſed to interfere, and left the plaintiff to his remedy at law.

§ 61. If the expreſs covenants for the title be not broken, the purchaſer's money cannot be recovered back at law.

§ 62. An adminiſtrator, having found among the papers of the deceaſed a mortgage for 1,200*l.*, aſſigned it over to a ſtranger, in conſideration of the ſaid ſum of 1,200 *l.*, which was paid to him: and, in the deed of aſſignment, the adminiſtrator covenanted, that neither the deceaſed, nor the adminiſtrator, had done any act to incumber the mortgaged eſtate. Bree v. Holbech, Doug. 654.

The mortgage-deed turned out to have been forged; and, after ſix years had elapſed, the aſſignee brought an action of *aſſumpſit* againſt the adminiſtrator, for money had and received to the plaintiff's uſe. The defendant pleaded the general iſſue, and the ſtatute of limitations. The plaintiff replied, and ſtated, that the recitals in the indenture of aſſignment were falſe, inaſmuch as there never was any indenture of mortgage; and that, by fraud and impoſition, the plaintiff was induced to pay the ſaid ſum of 1,200 *l.* To this replication, the defendant demurred generally.

Lord *Mansfield.*— "The baſis of the whole argu- "ment is fraud; and the queſtion is, whether fraud "is any where aſſerted in this replication. There "may

" may be many cases, where the assertion of a false " fact, though unknown to be false to the party mak- " ing the assertion, will be fraudulent; as, in the case " of Sir *Crisp Gascoyne*, who insured a life, and af- " firmed it was as good a life as any in *England*, not " knowing whether it was or was not. There may " be cases too, which fraud will take out of the sta- " tute of limitations. But, here, every thing alleged " in the replication may be true, without any fraud " on the part of the defendant. He is administrator " with the will annexed, who finds a mortgage deed " amongst the papers of his testator, without any ar- " rears of interest, and parts with it *bonâ fide*, as a " marketable commodity. If he had discovered the " forgery, and had then got rid of the deed as a true " security, the case would have been very different. " He did not covenant for the goodness of the title, but " only, that neither he, nor the testator, had incum- " bered the estate. It was incumbent on the plaintiff " to look to the goodness of it."

Treat. of Eq. Vol. 1. 364 *n.*

§ 63. A court of equity proceeds, in cases of this kind, upon the same principle as a court of law: for, unless there is fraud in concealing the defect in the title, the court will not interfere.

Urmston v. Pate, in Chan. 1st Nov. 1794.

§ 64. *William Davy* devised certain estates to his son, *William Davy*, for life, remainder to his first and other sons in tail male, remainder to Sir *Robert Ladbroke* and *Lyde Browne*, their heirs and assigns for ever, as tenants in common; and gave and devised all the

the reſidue of his real eſtate to his brother *William Pate*, his heirs and aſſigns for ever.

Sir *Robert Ladbroke* died in the lifetime of *William Davy* the teſtator. *William Davy* junior entered upon the eſtates, and died without iſſue, having deviſed his eſtates to *John Minuyer*, *Robert Pate*, and *Thomas Butler*, to ſell.

William Pate, the reſiduary deviſee in the will of *William Davy* the father, deviſed his reverſion, expectant on the death of *William Davy* junior, to *Robert Pate* in fee. *Barwell Browne*, the heir of *Lyde Browne*, and *Robert Pate*, (who conceived himſelf, as reſiduary legatee in the will of *William Davy* the father, to be entitled to the moiety deviſed to Sir *Robert Ladbroke*, and which became lapſed by his death in the lifetime of the teſtator), ſold the eſtate for a valuable conſideration to *Urmſton* the plaintiff.

The conveyance to *Urmſton* recited the will of *William Davy* the father, the death of Sir *Robert Ladbroke* in the lifetime of the teſtator, the death of *William Davy* the ſon without iſſue, and that *William Pate*, the reſiduary deviſee in the will of *William Davy* the father, had made his will, reciting that, in caſe of the death of *William Davy* the ſon without iſſue, he would become entitled to the moiety of the eſtate deviſed to Sir *Robert Ladbroke*, and had, by his ſaid will, given the reverſion of his ſaid moiety to his ſon (the defendant) in fee: and there was inſerted in it a covenant, that, notwithſtanding any act done by the defendant

or

or his anceſtors, or any perſon claiming under him or them, he was ſeiſed in fee of the premiſes. The purchaſer, finding *Robert Pate* had no title to the moiety conveyed to him, (it having deſcended to *William Davy* the ſon as heir to his father, and belonging now to his deviſees,) filed a bill in chancery, praying that his purchaſe-money might be reſtored to him.

The defendant, *Robert Pate*, demurred to the bill for want of equity, and the demurrer was allowed.

Who are bound to enter into theſe Covenants.

§ 65. All perſons, who convey lands whereof they are ſeiſed to their own uſe, are bound to enter into the uſual covenants for the title of the lands conveyed. But perſons, who convey as truſtees or under powers, as they are not beneficially intereſted in the ſale, are not obliged to enter into any covenants, except that they have done no act to incumber the eſtate; or to deſtroy the power under which they convey.

§ 66. When the practice of conveying or deviſing lands to truſtees, in truſt to ſell, became frequent; it was laid down as a rule among the conveyancers, that the perſons entitled to the money, ariſing from the ſale of the lands, were bound to enter into the uſual covenants, for the title; becauſe, as ſuch perſons had the beneficial intereſt in the land, they ought to be conſidered in equity as the owners thereof.

This doctrine was confirmed in the following caſe.

§ 67. Mr.

Lloyd v. Griffiths, 3 Atk. 236.

§ 67. Mr. *Thomas Lloyd* deviſed certain eſtates in the iſle of *Angleſea*, and county of *Carnarvon*, to truſtees; upon truſt, out of the rents thereof or by ſelling or mortgaging the ſame, to raiſe ſuch ſums as ſhould be ſufficient to diſcharge a mortgage, affecting an eſtate, which the teſtator had ſettled by deed on Mrs. *Heſter Webb*, as well as all his juſt debts. Upon a bill for carrying the truſts of this will into execution, the eſtates in *Angleſea* and *Carnarvon* were ſold for 27,000 *l.*; and a draft of the conveyance was prepared by Mr. *Booth*, the purchaſer's counſel; to which Mrs. *Webb* was a party, and made to enter into the uſual covenants for the title. The counſel for the grantors, Mr. *Weldon*, together with two other conveyancers, Mr. *Lane* and Mr. *Fazakerly*, objected to the draft; and gave their opinion, that Mrs. *Webb* was not bound to enter into covenants for the title. The draft was again referred to Mr. *Booth*, who ſupported his former opinion; and contended that, where a man deviſed an eſtate to truſtees, upon truſt to ſell and pay over the money to *J. S.* and the truſtees contracted with a purchaſer for the ſale of the eſtate; there, *J. S.* the deviſee of the money, who had the real beneficial intereſt in the eſtate, muſt covenant for the title; and that this was every day's practice. The Maſter, to whom the draft of the conveyance was referred, reported, that Mrs. *Webb* was not bound to enter into covenants for the title. Upon exceptions being taken to this report, Lord *Hardwicke* made the following order:—

" Let

" Let the exception be allowed; and let the Maſter " alter the draft of the conveyance prepared and " certified by him, by inſerting therein *proper cove-* " *nants from Mrs. Heſter Webb againſt her own acts,* " *and the acts of Mr. Thomas Lloyd* her deviſor, as " to ſo much as ſhe will be benefited by the eſtate."

§ 68. The rule, eſtabliſhed in the above caſe, has been in ſome degree weakened by the following modern determination.

Dutcheſs of Rutland v. Wakeman, Dom. Proc. 1798. 8 Bro. Parl. Ca. 145.

§ 69. *Thomas Eyre* deviſed the manor of *Eaſtwell* to *William Wakeman* and *Vincent Eyre*, their heirs and aſſigns; upon truſt to ſell the ſame, and to apply the money in payment of his debts and legacies, and to place out the reſidue on public or private ſecurities. The intereſt (after ſatisfying two ſmall annuities) to his wife lady *Mary Eyre* for life, and, after her death, two fifths to *James Eyre* for life, two other fifths to *Charles Eyre* for life, and the remaining fifth to *Mary Eyre* for life, the principal to go to the children of the ſaid *James*, *Charles*, and *Mary Eyre*.

The appellant, as guardian of the Duke of *Rutland* her ſon, contracted for the purchaſe of this eſtate, with the deviſees and truſtees of *Thomas Eyre*; and inſiſted that lady *Mary Eyre*, *James* and *Charles Eyre*, and *Mary Eyre*, ſhould covenant for the title, as far as they were benefited by the ſale.

3 Veſ. Jun. 233. 504.

This was refuſed by the reſpondents; and it was decreed by the Court of Chancery, that the appellants

lants ſhould accept a conveyance without thoſe covenants.

Upon an appeal from this decree, it was contended on behalf of the appellants, that lady *Mary Eyre*, *James Eyre*, *Charles Eyre*, and *Mary Eyre*, were neceſſary parties to the bill; becauſe the appellants were intitled to have covenants for the title from them to the extent of the benefit, which they derived from the ſale.

That, from the words and purport of the contract, they were entitled to ſuch covenants; and they were adviſed, that a proper conveyance could not be made without them. The agreement was, not to purchaſe the vendor's title, but *a good title* to the eſtate: and, as the conveyance by leaſe and releaſe paſſes only what the vendors can legally convey, and contains no warranty; the purchaſer cannot be aſſured of a good title, nor guarded againſt latent incumbrances, without ſuch covenants.

If the deviſe had been to the reſpondents themſelves, for their own uſe and benefit, ſubject to the payment of debts and legacies, and they had contracted to ſell, they muſt have covenanted with the purchaſer for the title; as it would, in that caſe, have been their eſtate. Upon the ſame principles the deviſees of the purchaſe money, after payment of debts, were compellable to enter into ſimilar covenants, to the extent of their reſpective intereſts: for it was in ſubſtance their eſtate, and they might pay off the incumbrance, and prevent the

the ſale. It was impoſſible to ſay there was no riſk: if there was any, thoſe perſons ſhould indemnify againſt it, who were paid as for a perfect title.

The above caſe of *Lloyd* v. *Griffiths* was ſtated: and it was ſaid that the deciſion in that caſe, and the principles therein laid down, had never been controverted; but, on the contrary, had been the rule adhered to and purſued in practice by every conveyancer of that time.

It might be objected, that purchaſers would have an equal right to call upon ſimple contract creditors, whoſe debts were by will charged on the real eſtate, to covenant for the title; and that in ſales under the crown, or by the aſſignees of bankrupts, there were no covenants.

To which it was anſwered, that with reſpect to ſimple contract creditors, whoſe debts were charged by the will upon the real eſtate, they could not be conſidered as volunteers, and ſtanding in the place of the teſtator; and the courſe and practice of conveyancing had been, not to require that they ſhould be parties to the conveyance, or enter into any covenants. The argument, therefore, in this caſe could not imply, on the part of the vendors, any undertaking for ſuch covenants, and the appellants did not require what it was *unuſual* to grant. As to contracts for the purchaſe of an eſtate from the crown, or from the aſſignees of a bankrupt, the party, who contracts to buy, is appriſed at the time he enters into the contract, that

that he can have no covenants for the title; and, therefore, in theſe caſes there is no breach of agreement on the part of the *vendees*, which made them perfectly diſtinct from the preſent. Beſides, the caſes laſt mentioned were *exceptions* to the *general rule*; and could not therefore be urged to prove its *non-exiſtence*.

On the other ſide it was contended, that the appellants were not entitled to any other covenants than ſuch, as were uſually entered into by truſtees, and a diſinherited heir at law. If it were adopted as an eſtabliſhed principle, that the perſons beneficially intereſted in the monies, ariſing from the ſales of eſtates circumſtanced as the eſtate in queſtion was, were neceſſary parties to the conveyance of ſuch eſtates; and that they muſt enter into covenants for the title in proportion to the intereſt they reſpectively claimed in the purchaſe monies, the inconvenience would be without meaſure, and the execution of numberleſs truſts rendered impoſſible. It would extend to all ſales from the aſſignees of bankrupts; to all ſales by truſtees for the payment of debts, where the creditors were not named, and frequently could not be found, until after it might be neceſſary to ſell the eſtate; to all ſales where infants were, and unborn perſons were, when born, to be intereſted in the purchaſe money in any degree; and even to ſales under decrees of courts of equity Beſides, if the covenants required could be inſiſted upon, it was eaſy to conceive the impoſſibility, in many caſes, and the difficulty and expence, in moſt caſes, of aſcertaining the quantum of damages

to be anſwered by the covenantor, his heirs, executors, adminiſtrators, or aſſigns, at perhaps very diſtant periods of time. Many more objections muſt neceſſarily occur to any one converſant with the ſubject. It had been urged that the legatees, chiefly intereſted in the purchaſe money, ought to covenant to the value of their intereſt: but the rule and principle, upon which the court was to act, could not poſſibly depend on the quantum of the legacy, which a party took. Every ſimple contract creditor, whoſe debt was paid out of money ariſing from the ſale of land, charged with ſimple contract debts, in fact, receives payment of his legacy, under the effect of that will. If any of the legatees are compellable to covenant for the title, all of them muſt be compellable to covenant in reſpect of the value of their legacies, whether veſted, contingent, remote, to be preſently paid, or to be paid in future, to be enjoyed in groſs, or to be taken by perſons born and unborn in ſucceſſion; and every ſimple contract creditor, who could not have his debt paid, if the will had not charged the land purchaſed, and who, under the will takes before legatees, muſt alſo be compellable to covenant to the value of his debt.

Such covenants, therefore, as were then required, muſt be miſchievous; principle could not require that they ſhould be inſerted; and in practice they were ſeldom inſerted in conveyances by truſtees of eſtates, deviſed to them to be ſold.

In

In the preſent caſe, the purchaſers knew they were contracting with ſuch truſtees; and of courſe they purchaſed with notice that they could only expect to have from thoſe, with whom they contracted, ſuch covenants as were, in the ordinary courſe of buſineſs, entered into by truſtees, and a diſinherited heir at law, in caſe he was willing to join in the conveyance. And they further knew the almoſt utter impoſſibility, in the preſent caſe, of procuring ſome of the perſons beneficially intereſted in the purchaſe money, to execute the propoſed conveyance, on account of their reſidence beyond the ſeas; and there was nothing in this caſe, which calls for a deviation from the common courſe of buſineſs. The title was clear; and there was no fair objection which could be made againſt it.

The decree was affirmed with 200 *l.* coſts.

§ 70. The eighth and laſt part of a deed is the concluſion, which mentions the execution of the deed, and the date, either expreſsly or by reference to ſome day and year previouſly mentioned. Concluſion.

TITLE XXXII.

DEED.

CHAP. VI.

Of a Feoffment, Gift, and Grant.

§ 1. *Different Kinds of Deeds.*
3. *Of a Feoffment.*
7. *Of Livery of Seiſin.*
21. *Who may convey by Feoffment.*
26. *A Feoffment cannot commence in futuro.*
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33. *And alſo a Forfeiture.*
34. *Of a Gift.*
35. *Of a Grant.*
39. *No technical Words neceſſary.*
41. *Who may convey by Grant.*
43. *Operation of a Grant.*

Section 1.

Different Kinds of Deeds.

HAVING diſcuſſed the general nature of deeds, it will now be neceſſary to conſider the ſeveral kinds which are known to the law, together with their various incidents and qualities. All deeds by which lands may be conveyed or charged derive their effect, either from the common law, or from the ſtatute of uſes. Of thoſe which derive their effect from the common law, ſome may be called original or primary, which are thoſe by means whereof the eſtate is originally created or ariſes. Others are derivative or ſecondary, whereby an eſtate already created, is enlarged, reſtrained, transferred, or extinguiſhed. And there is a third claſs which are uſed, not to convey, but to charge or incumber lands, and to diſcharge them again.

§ 2. The

§ 2. The original conveyances deriving their effect from the common law, are, 1, A feoffment. 2, A gift. 3, A grant. 4, A leaſe. 5, An exchange. 6, A partition. The derivative conveyances are, 1, A releaſe. 2, A confirmation. 3, A ſurrender. 4, An aſſignment. 5, A defeazance. Deeds which operate to charge or diſcharge lands are, 1, A bond. 2, A recognizance. 3, A defeazance on a bond.

Of a Feoffment.

§ 3. A feoffment, *feoffamentum*, is a ſubſtantive derived from the word *feoffare*, or *infeudare*, to give one a fief or feud; and therefore a feoffment was properly, *donatio feudi*, and Lord *Coke* ſays, the ancient writers called a feoffment *donatio*, from the verb *do* or *dedi*, which is the apteſt word of feoffment. 1 Inſt. 9 *a*.

Ante ch. 1., ſ. 31.

§ 4. A feoffment is evidently taken from the *breve teſtatum* of the feudal law, and the proper and original meaning of the word feoffment was, the gift of a feud. But by cuſtom it came afterwards to ſignify a gift of a free inheritance or *liberum tenementum*, to a man and his heirs, reſpect being had, rather to the perpetuity of the eſtate granted, than to the tenure. Mad. Form Diſſert. 4.

§ 5. A charter or deed of feoffment muſt be ſealed and delivered in the ſame manner as other deeds. And although no technical words are neceſſary to conſtitute a feoffment, yet the proper and uſual words are, give, grant, and enfeoff.

§ 6. A feoffment can only be made of corporeal hereditaments of which the actual poſſeſſion may be 1 Inſt. 9 *a*, 49 *a*.

delivered to the feoffee; and therefore corporeal hereditaments are frequently ſpoken of in law by the name of things that lie in livery.

Of Livery of Seiſin.

1 Inſt. 48 *a.*

§ 7. The mere ſigning and ſealing a deed of feoffment, was, however, in no inſtance ſufficient to transfer an eſtate of freehold from one perſon to another, unleſs the poſſeſſion was formally delivered by the feoffor to the feoffee, which was called livery of ſeiſin, and without which a deed of feoffment only paſſed an eſtate at will; and this ſtill continues to be the law.

5 Rep. 84 *b.* Plowd. 302.

§ 8. Livery of ſeiſin is in fact exactly ſimilar to the inveſtiture of the feudal law, and was adopted in *England* for the ſame reaſon, namely that the proprietor of each piece of land ſhould be publicly known, in order that the lord might be always certain on whom he was to call for the military ſervices that were due for the land; and that ſtrangers might know againſt whom they were to bring their *præcipes*.

Lit. ſ. 418. Perk. ſ. 226, 227.

§ 9. Where the lands compriſed in a feoffment are all ſituated in the ſame county, though in different vills, livery of ſeiſin of thoſe within one vill, in the name of all, will be good. But where the lands lie in different counties, there muſt be a livery in each county; unleſs they are all compriſed within a manor, for there livery of the manor in one of the counties will be ſufficient.

§ 10. As livery of ſeiſin is the delivery of the actual poſſeſſion, it follows that no perſon can give livery of ſeiſin who has not at the moment the actual poſſeſſion. And therefore where a perſon makes a feoffment of lands which are let on leaſe, he muſt obtain the aſſent of the leſſee to the livery. And in caſes of this kind the practice formerly was, for the leſſee to give up the poſſeſſion for a moment to the leſſor, in order to enable him to give livery. Bettiſworth's Caſe, 2 Rep. 3*i b.*

§ 11. Livery of ſeiſin is of two kinds, livery in deed, and livery in law; livery in deed is the actual delivery of the poſſeſſion, where the feoffor comes himſelf upon the land, and taking the ring of the door of the principal meſſuage, or a turf or a twig, delivers the ſame to the feoffee in the name of ſeiſin. Or it may be made by words only without the delivery of any thing, as if the feoffor be upon the land, or at the door of the houſe, and ſays to the feoffee, I am content that you ſhould enjoy this land according to the deed, this is a good livery to paſs the freehold. For the charter of feoffment makes the limitation of the eſtate, and then the words ſpoken by the feoffor on the land, are a ſufficient indication to the people preſent of the change of the poſſeſſion, 1 Inſt. 48 *a.* Sharp's Caſe, 6 Rep. 26.

§ 12. If a man merely delivers a deed of feoffment on the land, this will not amount to livery of ſeiſin, for it hath another operation to take effect as a deed; but if the feoffor delivers the deed upon the land in the name of ſeiſin of all the lands contained in the deed, this will be a good livery, Throughgood's Caſe, 9 Rep. 136.

1 Inſt. 48 *b.*

§ 13. Livery in law is where the feoffor is not actually on the land, or in the houſe, but being in ſight of it, ſays to the feoffee, I give you yonder houſe or land, go and enter into the ſame and take poſſeſſion of it accordingly. This ſort of livery ſeems to have been made at firſt only at the courts baron, which were anciently held in the open air, on ſome ſpot in the manor, from whence a general view might be taken of the whole; and the *pares curiæ* could eaſily diſtinguiſh the land which was to be transferred.

Idem.

§ 14. Livery in law does not however transfer the freehold until an actual entry is made by the feoffee, becauſe the poſſeſſion is not delivered to him, but only a licence or power given him by the feoffor to take poſſeſſion; and therefore if either the feoffor or feoffee die before an entry is made under the livery thus given, it becomes void.

Parſons v. Petit, 2 Salk. 165.

§ 15. A man and a woman were joint-tenants in fee, and the woman made a livery in view to the man by the words—Go and enter into poſſeſſion, but before it was executed ſhe married the feoffee.

It was argued that this feoffment was void, becauſe there was no actual entry purſuant to the livery, and that by the ſubſequent marriage, the feoffee was ſeiſed in right of his wife, and could not by his entry work any prejudice to her right. But it was adjudged that he might enter at any time; for he had not only an authority ſo to do, but an intereſt paſſed by the livery in

in view, by which act the woman did all which was in her power to do.

§ 16. If in a case of this kind the feoffee dare not enter upon the land, without endangering his life, he must claim the land as near as he may safely venture to go, and this will be sufficient to vest the possession in him, and to render the livery within view perfect and complete; for no one is obliged to expose his life for the security of his property. But when he has gone as far as he may with safety, the law very reasonably looks on such intention to be as effectual as the act itself. For otherwise it might be in the power of a stranger by an act of violence of his own, to deprive another of his right, and thereby to derive an advantage from an unlawful act. 1 Inst 48. b.

§ 17. Livery of seisin may be given and received by attorney, but the authority to give or receive livery must be by deed, that it may appear to the court that the attorney had a power to represent the parties, and that such power was properly pursued. Lit. f. 66. 1 Inst. 52 a.

§ 18. A deed of feoffment was made to three, *habendum* to two for their lives, remainder to the third for his life; and livery of seisin was made to all three *secundum formam chartæ*. The question was, whether livery so made, as if they had all estates in possession, whereas in truth one of them had but an estate in remainder, was good. The court was of opinion that the livery was good to two for their lives, remainder to the third. And the Chief Justice said, that Norris v. Trist, 2 Mod. R. 78.

that whatever the ancient opinions were about purſuing authorities with great exactneſs and nicety, yet this matter of livery upon indorſements of writing was always favourably expounded of later times, unleſs where it plainly appeared that the authority was not purſued at all. As if a letter of attorney was made to three jointly and ſeverally, two could not execute it, becauſe they were not the parties delegated; they did not agree with the authority.

1 Inſt. 52 *a.*

§ 19. Livery of ſeiſin under a power of attorney muſt be made during the lifetime of the feoffor; for the power ceaſes by his death.

Jackſon v. Jackſon, Fitzg. R. 146.

Burgh v. Francis, Fin. 28. 174.

§ 20. A court of equity will preſume livery of ſeiſin to have been made, though not indorſed on the deed, where the poſſeſſion has gone according to the feoffment for a great length of time; and in ſome caſes has even ſupplied the want of livery.

Who may convey by Feoffment.

§ 21. All thoſe who are capable of conveying their lands by deed, may make a feoffment: and ſome perſons may bind themſelves to a certain degree by feoffment, though not by any other kind of deed.

Lit. f. 406.

§ 22. Thus if an idiot or lunatic make a feoffment, and give livery of ſeiſin in perſon, it will bind him, ſo that he cannot by any proceſs or plea avoid it, and reſtore himſelf to the poſſeſſion. The reaſon is, becauſe the livery being formerly made before the *pares curiæ*, their ſolemn atteſtation of the change of poſſeſſion could not be defeated by the perſon himſelf, it being

being preſumed that they were competent judges of the feoffor's ability to make the feoffment.

§ 23. If an infant makes a feoffment and gives livery of ſeiſin in perſon, it is not void, but only voidable; for there muſt be ſome act of notoriety to reſtore the poſſeſſion to him, equal to that by which he transferred it,

§ 24. Where an infant, idiot, or lunatic, made a feoffment and delivered ſeiſin in perſon, it was held that it barred the lord of his eſcheat; for though it might have been avoided by the heir of the infant, idiot, or lunatic, becauſe he was privy in blood, yet it could not be avoided by a perſon who was only privy in eſtate.

Whitting-ham's Caſe, 8 Rep. 42. 4 Rep. 125 a. Tit. 30. f. 18.

§ 25. But if an idiot, lunatic, or infant, executes a feoffment, and a power of attorney to give livery of ſeiſin, and livery is given accordingly, the whole is void; becauſe the power of attorney is void.

4 Rep. 125 a.

§ 26. A feoffment cannot be made to commence *in futuro*, and therefore if a perſon makes a feoffment to commence on a future day, and delivers ſeiſin immediately, the livery will be void, and nothing more than an eſtate at will paſſes to the feoffee. This doctrine is founded on two reaſons, 1ſt, Becauſe the object and deſign of the ceremony of livery of ſeiſin would fail, if it were allowed to paſs an eſtate to commence *in futuro;* as it would in that caſe be no evidence of the change of poſſeſſion. 2d, The freehold would be in

A Feoffment cannot commence in futuro. 1 Inſt. 217 a. 2 Wilſ. R. 166.

Tit. 1. f. 47. in abeyance which is never allowed where it can, by any means, be avoided.

§ 27. An eſtate may, however, be created by feoffment to commence *in futuro*, by way of remainder; as where a leaſe is made to *A.* for three years, remainder to *B.* in fee. Here livery of ſeiſin muſt be given to *A.* by which means the freehold is immediately created, and veſted in *B.* during the continuance of *A.*'s eſtate for years.

Lit. f. 60.

Operation of a Feoffment.

§ 28. The operation of a feoffment is in ſome inſtances ſtronger than that of any other conveyance. Thus Lord *Coke* ſays that a feoffment, "cleareth all "diſſeiſins, abatements, intruſions, and other wrong-"ful or defeaſible eſtates, where the entry of the "feoffor is lawful; which neither fine, recovery, nor "bargain and ſale by deed indented and inrolled, "doth."

1 Inſt. 9 *a.* Shep. T. 203.

Transfers the Freehold by Diſſeiſin.

§ 29. The moſt ſingular and powerful effect of a feoffment is, that it operates on the poſſeſſion, without any regard to the eſtate or intereſt of the feoffor; ſo that to make a feoffment good and valid, nothing is wanting but poſſeſſion. Thus *Littleton* ſays that if a tenant for life, or years, makes a feoffment in fee with livery of ſeiſin, it will give an eſtate in fee, and operate as a diſſeiſin of the real owner.

§ 611. 698. 2 Inſt. 244.

§ 30. The principles upon which this doctrine is founded, are thus explained by Mr. *Butler*. By the old law no perſon who had an eſtate of leſs duration and

1 Inſt. 330 *b.* n. 1.

and extent than for his own life, or for the life of another, was conſidered as a freeholder; and none but a freeholder was deemed to have poſſeſſion of the land. It is true that eſtates were ſometimes held for years; in that caſe the poſſeſſion of the tenant for years was conſidered to be the poſſeſſion of the freeholder, but ſtill the tenant for years held the poſſeſſion, though he held it for the freeholder, and the freeholder by truſting the termor with it, expoſed himſelf to loſe it by the termor's negligence or treachery. If the termor left the poſſeſſion vacant, if he permitted himſelf to be diſſeiſed of it, if he undertook to alien it, either by act in *pais*, or by matter of record, if he claimed the fee, or if he affirmed it to be in a ſtranger; in all theſe caſes the freeholder expoſed himſelf to the loſs of the poſſeſſion, as much as if they were his own acts. Thus the termor held the poſſeſſion, but he was ſaid to hold it *nomine alieno*, in contradiſtinction to the freeholder himſelf, who was ſaid to hold it *nomine proprio*. Hence *Britton* expreſsly defines an eſtate of freehold to be "The poſſeſſion of the ſoil by the "freeholder;" and the author of *Doctor and Student* ſays, that the poſſeſſion of the land is called in the law of *England* the franktenement or freehold; ſo nearly ſynonymous in thoſe days were the words poſſeſſion and freehold. In this manner the poſſeſſion of a termor differed from that of a mere bailiff, who had no poſſeſſion.

Ch. 52.

B. 2. D. 2.

§ 31. The ſame principles obtained reſpecting the transfer of the freehold. Nothing farther was neceſſary, than a delivery of the poſſeſſion, or, as it was called

Idem.

called by the law writers, livery of ſeiſin, the freehold could be transferred by no other means. But, here, a difference is to be obſerved, with reſpect to the effect of the livery of a tenant for years, and the livery of a mere bailiff. On account of the ſolemnity upon which the entry of the tenant for years was grounded, the connection between him and the reverſioner, and his actually holding poſſeſſion of the land, (though he held it for the freeholder), the livery of the former was a transfer of the poſſeſſion and fee-ſimple, but that of the latter had no effect. Thus, by the old law, on the one hand, the freehold could not be transferred but by livery of ſeiſin; on the other, livery of ſeiſin could not be made by any perſon who had the poſſeſſion, without transferring the fee-ſimple.

Taylor v. Horde.

The doctrine above ſtated has been, in ſome reſpects, denied in a modern caſe; of which, an account will be given in Title 36. Recovery.

Creates a Diſcontinuance. 1 Inſt. 327 *b.*

§ 32. A feoffment by a tenant in tail, who is actually ſeiſed by force of the intail, creates a diſcontinuance of the eſtate tail, by transferring to the feoffee not only the poſſeſſion, but alſo the right of poſſeſſion, ſo as to take away the right of entry of the iſſue in tail, and of the perſons in remainder and reverſion, and to drive them to their real action.

Tit. 29. c. 1. f.

And alſo a Forfeiture.

§ 33. A feoffment by a particular tenant will create a forfeiture of his eſtate, becauſe it transfers the fee-ſimple, and deveſts the remainder or reverſion.

Tit. 3. f. 97.

§ 34. A gift

§ 34. A gift, *donatio*, is properly applied to the creation of an eſtate tail, as a feoffment is to that of an eſtate in fee-ſimple. It differs in nothing from a feoffment, but in the nature of the eſtate paſſing by it, and livery of ſeiſin muſt be given, to render it effectual. Of a Gift. 2 Com. 316.

§ 35. A grant is a conveyance ſo far ſimilar to a feoffment, that the operative words are *dedi et conceſſi*, given and granted. And as a feoffment was the regular mode of conveying corporeal hereditaments, ſo, a grant was the proper mode of conveying incorporeal hereditaments. Hence the expreſſion, that advowſons, rents, commons, &c. lie in grant. Of a Grant. 1 Inſt. 9 a. 172 a.

§ 36. As the objects of a grant are not capable of corporeal delivery, it follows, that livery of ſeiſin cannot be given upon a grant; but ſtill it was always held, that a grant, accompanied with the attornment of the tenant, was equally valid with a feoffment and livery of ſeiſin.

§ 37. Although a feoffment might formerly have been made by parol only, yet a grant could not, in general, be made without deed; becauſe, as the poſſeſſion of thoſe things, which were the ſubject matter of a grant, cannot be transferred by livery, there could be no other evidence of a grant but the deed.

§ 38. By the old law, no grant was good without the attornment or conſent of the tenant, but, now, the neceſſity of attornment is taken away.

§ 39. The

No technical Words neceſſary. 1 Inſt. 147 *a.*

§ 39. The proper and technical words of a grant are, *dedi et conceſſi*, hath given and granted; but any other words that ſhew the intention of the parties, will have the ſame effect.

Holmes v. Sellers, 3 Lev. 305.

§ 40. *A.* entered into an article with *B.*, by which he agreed, that, in conſideration of a certain rent, *B.* ſhould have a way for himſelf and his heirs over certain lands of *A.* This was held to be a good grant of a right of way, and not merely a covenant for enjoyment.

Who may convey by Grant.

§ 41. Every perſon who has a preſent eſtate or intereſt in lands, in remainder or reverſion, may convey it away by grant, becauſe eſtates in remainder and reverſion conſiſt in right only. So every one may grant away any incorporeal hereditament, ſuch as an advowſon, a rent, common, *&c.* But a bare right or poſſibility cannot be granted.

Peak. f. 65.

§ 42. A perſon cannot, however, grant or charge that which he hath not; and, therefore, if a man grants a rent-charge out of the manor of *Dale*, when, in truth, he hath nothing in the manor, and afterwards purchaſes it, he ſhall hold it diſcharged from this grant.

Operation of a Grant.

§ 43. As to the operation of a grant, it is materially different from that of a feoffment, for, we have ſeen, that a feoffment operates immediately on the poſſeſſion, without any regard to the eſtate or intereſt of the feoffor. But a grant only operates on the eſtate of

of the grantor, and will paſs no more than what the grantor is by law enabled to convey. This rule, probably, aroſe from the circumſtance, that a grant being always made by deed, the eſtate of the grantor might be known by inſpection of the deed; and, if the eſtate granted was greater than the eſtate which the grantor had, it was merely void, and the grant only paſſed as much as the grantor could really give.

§ 44. Lord Chief Baron *Gilbert* ſeems to have been of opinion, that the reaſon why a grant paſſes no more than the grantor can lawfully give, is, becauſe it is a ſecret conveyance, and therefore ought not to be allowed to have ſo extenſive an operation as a feoffment, in which livery of ſeiſin is publicly given. Ten. 122.

§ 45. A grant cannot, in any caſe, operate as a diſcontinuance: but this is rather owing to the nature of the things which are the ſubject matter of the grant, than to the grant itſelf; for the ſubject matter of grants being rights only, they cannot, from their nature, be diſcontinued. 1 Inſt. 327 *b.*

§ 46. If, therefore, a tenant in tail of a rent, advowſon, common, or of a remainder or reverſion, expectant on an eſtate of freehold, makes a grant in fee, this is no diſcontinuance of the eſtate tail, for nothing paſſes but during the life of the tenant in tail, which is not unlawful. Lit. ſ. 627. 1 Inſt. 327 *b.*

§ 47. It follows, from the ſame principle, that a grant can in no inſtance operate as a forfeiture: for a 1 Inſt. 251 *b.*

grant cannot prejudice the perſon in remainder or reverſion, becauſe, if the grantee ſhould claim a greater eſtate than the grantor can lawfully give, he could make no title to it without the original grant made to his grantor; by which, it muſt appear what intereſt he had, and, conſequently, what eſtate he could convey; and ſo the grantee, notwithſtanding his grant in fee, could claim no greater eſtate than his grantor had power to make, and, conſequently, the perſon in reverſion could not be prejudiced.

TITLE XXXII.

DEED.

CHAP. VII.

Of a Leaſe.

§ 1. *Deſcription of.*
3. *No technical Words neceſſary.*
5. *Muſt have a certain Beginning and Continuance*
10. *May determine on Breach of a Condition.*
11. *Who may make Leaſes.*
12. *Joint-Tenants, Coparceners, and Tenants in common.*
13. *Tenants in Tail.*
17. *Huſbands ſeiſed* Jure Uxoris.
18. *Eccleſiaſtics ſeiſed* Jure Eccleſiæ.
§ 20. *Circumſtances required in theſe Leaſes.*
41. *Tenants for Life.*
44. *Tenants in Dower and by the Curteſy.*
45. *Tenants for Years.*
47. *Guardians in Socage.*
48. *Executors and Adminiſtrators.*
49. *Who are incapable of making Leaſes.*
50. *Infants.*
53. *Married Women.*
54. *Of void and voidable Leaſes.*

Section 1.

A LEASE is a contract for the poſſeſſion and profits of lands and tenements on the one ſide, and a recompence of rent or other income on the other, or elſe it is a conveyance of lands and tenements to a perſon for life or years, or at will, in conſideration of a return of rent, or other recompence. Deſcription of.

§ 2. Where a freehold eſtate is created by leaſe, livery of ſeiſin muſt be given to the leſſee. And where the leaſe is for a term of years, there muſt be an entry by the leſſee. Tit. 1. ſ. 19. Vide Tit. 8. ch. 1. ſ. 14.

No technical Words neceſſary. 1 Inſt. 45 *b.*

§ 3. Lord *Coke* ſays, that the words demiſe, leaſe, and to farm let, are the proper technical expreſſions to conſtitute a leaſe. But any other words which ſufficiently ſhew the intention of the parties, that the one ſhall diveſt himſelf of the poſſeſſion, and the other come into it, for a certain time, whether they run in the form of a licence, covenant, or agreement, are of themſelves ſufficient, and will, in conſtruction of law, amount to a leaſe, as effectually as if the moſt proper and pertinent words had been uſed for that purpoſe.

Bac. Ab. Tit. Leaſe (K.)

Idem.

§ 4. On the other hand, although the moſt proper form of words of leaſing are made uſe of, yet, if upon the whole deed, there appears no ſuch intent, but that it is only preparatory and relative to a future leaſe to be made, the law will rather do violence to the words, than break through the intent of the parties, by conſtruing that to be a preſent leaſe, which was only intended by the parties as an article or agreement for a leaſe.

Doe v. Archer, 1 Boſan. & Pull. 531.

Muſt have a certain beginning and Continuance. 1 Inſt. 45 *b.*

§ 5. No leaſe is good, unleſs it contains a ſufficient degree of certainty, as to its beginning, continuance, and ending. If a leaſe be made to begin from an impoſſible date, as from the 30th of *February*, it will take effect from its delivery; but where the time when a leaſe is to commence is uncertain, as where a leaſe was made, *habendum* from the 20th of *November*, without ſaying what *November*, this uncertainty will render the leaſe void, becauſe it was part of the agreement, that the leaſe ſhould commence from the 20th of ſome *November* or other; but it not appearing to the

Bac. Ab. Tit. Leaſe (L.)

Anon. 1 Mod. 180.

the court what *November* was intended, they cannot determine it for the parties, and, therefore, the leaſe is void.

§ 6. Lord *Coke* ſays, where a leaſe is made, dated 26th *May*, to commence from the date, or from the day of the date, it ſhall begin on the 27th day of *May*. If the leaſe be dated the 26th *May* to hold from the making thereof, or from thenceforth, it ſhall begin on the day on which it is delivered, for the words of the indenture are not of any effect till the delivery, and thereby from the making, or from thenceforth, take their firſt effect. But if it be a *die confectionis*, then it ſhall begin on the next day after the delivery. 1 Inſt. 46 *b*.

§ 7. This doctrine has been denied; and it has been held, that the word from, may, in the vulgar ſenſe, and even in the ſtrict propriety of language, mean either incluſive or excluſive: and, where the leaſe can only be ſupported by conſtruing the word from, incluſive, a court ought to give it that ſenſe. Freeman v. Weſt. 2 Wilſ. R. 165. Vide Pugh v. D. of Leeds, infra.

§ 8. As to the continuance of a leaſe, it muſt alſo have a degree of certainty: but *id certum eſt quod certum reddi poteſt*. Therefore a leaſe for ſo many years as *J. S.* ſhall name, is a good leaſe for years; for, though it is at preſent uncertain, yet when *J. S.* hath named the years, it is then reduced to a certainty. 1 Inſt. 45 *b*.

§ 9. If a perſon makes a leaſe for ſo many years as he ſhall live, or, if the parſon of *D.* makes a leaſe of his glebe, for ſo many years as he ſhall be parſon there, 1 Inſt. 45 *b*.

theſe leaſes are ſaid to be abſolutely void, on account of the uncertainty of their continuance. But if a leaſe be made for 21 years, or any other certain number of years, provided the leſſee ſhall ſo long live, or continue parſon of *D.*, it will be good; for the leaſe is originally confined to a determinate number of years, though it may determine ſooner.

May determine on Breach of a Condition. Vide Tit. 8. c. 1. ſ. 31. Tit. 13. c. 1. ſ. 32.

§ 10. Although a leaſe muſt, at its creation, have a preciſe period fixed beyond which it is not to continue, yet it may determine prior to that period, in conſequence of a proviſo or condition: and, in all modern leaſes, there is a proviſo, that if the rent is not paid, and no ſufficient diſtreſs is found on the premiſes, the leſſor may re-enter and enjoy the lands, as in his former eſtate.

Who may make Leaſes.

§ 11. With reſpect to the perſons who are capable, by the common law, of making leaſes, it may be laid down, that all thoſe who are capable of alienating their property, or of entering into contracts reſpecting it, may make leaſes, which will endure as long as their intereſt in the thing leaſed, but no longer.

Joint-Tenants, Coparceners, and Tenants in common. Tit 18. c. 1. ſ. 53. 1 Inſt. 186 *b.*

§ 12. Joint-tenants, coparceners, and tenants in common, may either make leaſes of their undivided ſhares, or elſe may all join in a leaſe of the whole to a ſtranger: and one joint-tenant, or tenant in common, may make a leaſe of his part to his companion. For this only gives him a right of taking the whole profits, when, before, he had but a right to the moiety thereof;

of; and he may contract with his companion for that purpose, as well as with a stranger.

Tenants in Tail.

§ 13. In consequence of the statute *De Donis Conditionalibus*, all leases made by tenants in tail might have been avoided by their issue, or by the persons entitled to the remainder or reversion. But by the statute 32 *Hen.* 8. c. 28. s. 1. it is enacted, that all leases made for term of years, or for term of life, by any person or persons being of full age having any estate of inheritance either in fee-simple or in fee-tail, shall be good and effectual in the law against the lessors and their heirs.

1 Inst. 44 a.

§ 14. This statute does not, however, extend to the persons entitled to the remainder or reversion expectant on the determination of an estate tail; so that, where a tenant in tail dies without issue, no lease made by him, though it be pursuant to this statute, will bind the remainder-men or reversioner.

1 Inst. 333 a. Vaugh. R. 383.

§ 15. A lease by tenant in tail, which is warranted by this statute, will not create a discontinuance, because an act of parliament, to which every man is a party, allows of such leases; which, if they were tortious, as all discontinuances are, parliament would not allow: and, therefore, if a warranty is annexed to such a lease, it will not make a discontinuance, for it will determine with the lease.

Walter v. Jackson, 1 Roll Ab. 633.

§ 16. But, if a lease for three lives be not warranted by the statute 32 *Hen.* 8., it will operate as a discontinuance; because it is a greater estate than the tenant

in tail can make, and paſſes by livery, which takes the eſtate from the tenant in tail, and turns it into a reverſion in fee, determinable upon three lives.

Huſbands ſeiſed *Jure Uxoris.*

§ 17. It is enacted by the ſame ſtatute, that all leaſes made for term of years or life, by perſons having an eſtate of inheritance in right of their wives, or jointly with their wives, of any eſtate of inheritance made before the coverture, or after, ſhall be good and effectual in law againſt the leſſors, their wives and their heirs, provided that the wife be made a party to every ſuch leaſe, and that the leaſe be made by indenture in the name of the huſband and his wife, and ſhe do ſeal the ſame, and that the rent be reſerved to the huſband and wife, and to the heirs of the wife, according to her eſtate of inheritance in the ſame; and that the huſband ſhall not in anywiſe alien, diſcharge, grant, or give away the ſame rent reſerved, nor any part thereof, longer than during the coverture, except by fine levied by the huſband and wife; but that the ſame rent ſhall remain, after the death of the huſband, to the perſons to whom the lands would have gone, if no ſuch leaſe had been made.

Eccleſiaſtics ſeiſ d *Jure Eccleſiæ.*

§ 18. By the common law, leaſes made by eccleſiaſtical perſons, of the lands whereof they were ſeiſed in right of their churches, were, in many caſes, not binding on their ſucceſſors, and, therefore, it was enacted by the ſtatute 32 *Hen.* 8. c. 28. that all leaſes for term of years or life, by any perſon having an eſtate of inheritance in right of their churches, ſhall be good and effectual againſt the leſſors and their ſucceſſors.

§ 19. There

§ 19. There are ſeveral other ſtatutes, by which all alienations by eccleſiaſtical perſons of thoſe lands, tenements, and hereditaments, whereof they are ſeiſed in right of their churches, are declared void, except leaſes for 21 years or three lives, which are called *the diſabling Statutes.* 1 Eliz. c. 19. 13 Eliz. c. 10. 1 Jac. 1. c. 3.

§ 20. The circumſtances required by the ſtatute 32 *Hen.* 8. and the ſubſequent ſtatutes, to render leaſes made by tenants in tail, huſbands ſeiſed in right of their wives, and eccleſiaſtical perſons, valid and binding on their heirs and ſucceſſors, are chiefly theſe. Circumſtances required in theſe Leaſes.

§ 21. 1ſt, All ſuch leaſes muſt be by deed indented, and not by deed poll, or by parol. But if the deed be indented, whether it begins with the words this indenture or not, is not material: and, on the other hand, if it be not indented, the calling it an indenture will not make it ſo. 1 Inſt. 44 *a.*

§ 22. 2d, All ſuch leaſes muſt be made to begin from the day of the making thereof, or from the making thereof. 1 Inſt. 44 *b.*

§ 23. 3d, If there be an old leaſe in being, it muſt be ſurrendered or ended within one year next after the making the new leaſe; and ſuch ſurrender muſt be abſolute, and not conditional; for then the intention of the ſtatute might eaſily be evaded by ſetting up ſuch old leaſe again, upon breach of the condition. Idem.

§ 24. A ſurrender upon condition, that the leſſor ſhould make a new leaſe within a week after, has been held to be good.

§ 25. The

Wilſon v. Carter, 2 Stra. 1201.

§ 25. The leſſor of the plaintiff being a prebendary of *Sarum*, brought an ejectment to avoid a leaſe made by his predeceſſor, as not being conformable to the proviſo in the ſtatute 32 *Hen.* 8. becauſe the ſurrender of the former leaſe was with a condition that if the then prebendary did not within a week after, grant a new leaſe for three lives, the ſurrender ſhould be void; whereby, as it was contended for the plaintiff, the old term was not abſolutely gone, but the leſſee reſerved a power of ſetting it up again. The court after two arguments gave judgment for the defendant, this being within the intent of the ſtatute, which was, that there ſhould not be two long leaſes ſtanding out againſt the ſucceſſor. Here the new leaſe was made within the week, and from thence it became an abſolute ſurrender both in deed and in law. And the whole was out of the leſſee without farther act to be done by him. In the proviſo in the ſtatute there was the word ended, as well as ſurrendered; and could any one ſay the firſt leaſe was not at an end? This was no more than a reaſonable caution in the firſt leſſee, to keep ſome hold of his old eſtate, till a new title was made to him.

Thompſon v. Trafford, Poph. R. 9.

§ 26. A ſurrender in law by the taking of a new leaſe, either to begin preſently, or on a day to come, ſeems a good ſurrender within theſe ſtatutes; for by taking ſuch new leaſe, though it be to commence at a future day, the firſt leaſe is preſently ſurrendered and gone, and ſhall not continue good till the day on which the ſecond leaſe is to commence; but by acceptance of ſuch ſecond leaſe, the firſt is immediately determined,

determined, becauſe both leaſes cannot exiſt together, and the firſt cannot be diſſolved or ſurrendered in part, and therefore muſt be ſurrendered for the whole.

§ 27. The ſtatute 13 *Eliz.* c. 11. enacts, that all leaſes to be made by any eccleſiaſtical, ſpiritual, or collegiate perſons, or others, within the 13 *Eliz.* c. 10. of any lands, *&c.* whereof any former leaſe for years is in being, and not to be expired, ſurrendered, or ended, within three years next after the making of any ſuch new leaſe, ſhall be void, and of no effect.

§ 28. 4th, The duration of all leaſes made under theſe ſtatutes muſt not exceed twenty-one years or three lives. But leaſes for fewer years or lives are good, the intention of theſe ſtatutes being only to abridge the power of making long and unreaſonable leaſes, by reducing them to a determinate number of years or lives, which they ſhould not exceed: but might be made as much under as the party pleaſed. 1 Inſt. 44 *b.*

§ 29. If a biſhop makes a leaſe for four lives, and one of them dies in the life of the biſhop, ſo that at his death there are but three lives in being, yet the leaſe will be void againſt his ſucceſſor, for as it was originally void by 1 *Eliz.* no ſubſequent event can make it good. 10 Rep. 62 *a.*

§ 30. If a leaſe be made to *A.* for the lives of *B. C.* and *D.* it is a good leaſe to one for the lives of three other perſons, and a leaſe to three for their lives is Baugh v. Haines, Cro. Ja. 76.

is all one within the intent of theſe ſtatutes: for in both caſes three lives are the meaſure of the eſtate created, which is all the ſtatutes require.

8 Rep. 69 *b.* § 31. It appears to be underſtood that a leaſe for ſixty years, if three lives ſhall ſo long live, is good within the ſtatute 32 *Hen.* 8., for in *Whitlock*'s caſe it was laid down, that if a man has power to make leaſes abſolutely or generally, as the ſeveral perſons compriſed in the ſtatute 32 *Hen.* 8. have, and a proviſo or reſtraint comes after, as in that act, that ſuch leaſes ſhall not exceed twenty-one years, or three lives, there a leaſe for ninety-nine years determinable on two or three lives was good, within the firſt part of the act, and not made void by the laſt part thereof, becauſe it does not exceed the three lives thereby allowed, though it be not directly for three lives. But a leaſe for ninety-nine years determinable on three lives could not be ſupported under the diſabling ſtatutes of 1 *Eliz.* and 13 *Eliz.* for the firſt part of theſe acts makes void all eſtates, gifts, grants, *&c.* and the laſt part only ſaves leaſes for twenty-one years or three lives, ſo that a leaſe of this kind being void by the firſt part of theſe ſtatutes, and not within the ſaving of the laſt part, being neither for twenty-one years, nor three lives, ſhall not bind the ſucceſſor. There is a *quere* added to this paſſage in *Bacon's Abridgement.*

1 Inſt. 44 *b.* § 32. 5th, All leaſes under theſe ſtatutes muſt be of lands, tenements, or hereditaments, whereto reſort may be had for the rent reſerved thereout by diſtreſs.

For

For otherwiſe the heirs or ſucceſſors of the leſſors would be without any remedy for the recovery of the rent: and therefore theſe ſtatutes do not extend to things lying in grant, as advowſons, &c. whereout a rent cannot be reſerved.

§ 33. It has however been enacted by a modern ſtatute, 5 *Geo.* 3. c. 17., that leaſes of tithes or other incorporeal hereditaments alone, may be granted by any biſhop or eleemoſynary corporation, and the ſucceſſors ſhall be entitled to recover the rent, by an action of debt, which in caſe of a freehold leaſe they could not have brought by the common law. Tit. 28. c. 1. f. 17.

§ 34. 6th, There is a proviſo in the ſtatute 32 *Hen.* 8. that it ſhall not extend, "to any leaſe of any manors, "lands, tenements, or hereditaments, which have "not moſt commonly been letten to farm, or oc- "cupied by the farmers thereof, by the ſpace of "twenty years next before ſuch leaſe thereof made."

§ 35. The intention of this clauſe was to prevent the perſons enabled by the ſtatute to demiſe, from making leaſes of their manſion houſes and demeſnes, ſo as to bind their heirs or ſucceſſors; as that circumſtance would have produced a great decay of hoſpitality.

§ 36. Various opinions have been held upon the conſtruction of this clauſe. The better of them ſeems to be that it conſiſts of two parts in the disjunctive, and if either of them be obſerved it is ſufficient to Bac. Ab. Tit. Leaſe (E.)

ſupport

ſupport the leaſe. The firſt is—" which have not " moſt commonly been letten," which is general. The other is, " or occupied by the farmers thereof " by the ſpace of twenty years, *&c.*" and that the moſt natural and genuine meaning of the word is, that the lands to be leaſed muſt either be ſuch as have been moſt commonly letten, that is, ſuch as are not reputed part of the demeſnes, or ſuch as have been occupied by the farmers thereof by the ſpace of twenty years.

Idem. § 37. If lands have been let or occupied for eleven years or more, at one or ſeveral times within the twenty years next before a leaſe for twenty-one years or three lives, it will be ſufficient. And a demiſe by copy of court roll will be conſidered as a ſufficient letting to farm, within the ſtatute.

§ 38. 7th, The ſtatute 32 *Hen.* 8. further provides " that upon every ſuch leaſe there be reſerved yearly " during the ſame leaſe, due and payable to the leſſors, " their heirs and ſucceſſors, to whom the ſame lands " ſhould have come after the death of the leſſors, if " no leaſe had been thereof made, and to whom the " reverſion thereof ſhould appertain, according to " their eſtates and intereſts, ſo much yearly farm or " rent, or more, as hath been moſt accuſtomably " yielden or paid for the manors, *&c.* ſo to be letten, " within twenty years next before ſuch leaſe thereof " made."

§ 39. It

§ 39. It ſeems not to be yet fully ſettled whether a tenant in tail, or a biſhop, may make a leaſe of part of lands which have been uſually let for a certain rent, reſerving a rent *pro rata.* For it is ſaid that if biſhops, *&c.* have the power of dividing their farms, and leaſing them out in ſmaller parcels, the whole eſtate is no longer anſwerable for the whole rent. The ſecurity is leſſened by ſuch a diviſion, and there may poſſibly be an entire deficiency of remedy for portions of the rent. But the better opinion appears to be that ſuch leaſes are good, becauſe the ancient rent is in fact reſerved, and otherwiſe perhaps they could not leaſe at all, if they had not a power of dividing the great farms*.

§ 40. 8th, The laſt rule to be obſerved in reſpect to leaſes under this ſtatute, is, that they muſt not be made without impeachment of waſte: for if, as the preamble ſpeaks, long and unreaſonable leaſes are the chief cauſe of dilapidations, and of the decay of hoſpitality; much more would they be ſo, if they were made diſpuniſhable for waſte.

§ 41. Tenants for life cannot make leaſes to continue longer than for their own lives; and Lord *Coke* ſays, that where *A.* leſſee for the life of *B.* makes a leaſe for years by deed indented, and after purchaſes the reverſion in fee; *B.* dieth, *A.* ſhall avoid his own

Tenants for Life. 1 Inſt. 47 *b.*

* There is a private act of parliament, 35 *Geo.* 3. c. 109. to enable the biſhop of *Ely*, and his ſucceſſors, to grant by ſeveral leaſes an eſtate in the iſle of *Ely*, then held under one leaſe.

leaſe,

leaſe, for he may confeſs and avoid the leaſe, which took effect in point of intereſt, and determined by the death of *B.* But if *A.* had nothing in the land, and made a leaſe for years by deed indented, and after purchaſe the land, the leſſor is as well concluded as the leſſee to ſay that the leſſor had nothing in the land, and here it worketh only upon the concluſion, and the leſſor cannot confeſs and avoid, as he might in the other caſe.

1 Inſt. 45 *a.* Treport's Caſe, 6 Rep. 14 *b.*

§ 42. Where the perſon in remainder or reverſion joins with the tenant for life in making a leaſe, it is good, and is conſidered during the life of the tenant for life as his leaſe, and the confirmation of the remainder man or reverſioner. And after the death of the tenant for life, it is conſidered as the leaſe of the remainder man or reverſioner, and the confirmation of the tenant for life.

Ludford v. Barber, 1 Term R. 86.

§ 43. It was reſolved in a modern caſe that a leaſe executed by a tenant for life, in which the reverſioner who was then under age was named as a party, but did not execute it, was void on the death of the tenant for life; and that an execution of the leaſe by the reverſioner, two years after the death of the tenant for life, did not make it good.

Tenants in Dower and by the Curteſy.

§ 44. Where tenant in dower or by the curteſy makes a leaſe for years, and dies, it is abſolutely determined; for though their eſtate is *quodammodo* a continuance of the eſtate of huſband or wife, yet it is a continuance of it only for life; and they have no power

power to contract for, or intermeddle with the inheritance, and conſequently their leaſes or charges fall off with the eſtate out of which they were derived.

Tenants for Years.

§ 45. As leſſees for years may aſſign or grant over their whole intereſt, ſo they may grant it for any fewer number of years than thoſe for which they hold it; and ſuch derivative leſſees are compellable to pay rent, and perform covenants according to the terms agreed upon in ſuch derivative leaſes.

§ 46. By the ſtatute 4 *Geo.* 2. c. 28. ſ. 6. reciting that leaſes for lives or years could not be renewed without a ſurrender of all the under-leaſes derived out of the ſame; it was enacted, that all future renewals of leaſes for lives or years ſhould be deemed good and valid, without the ſurrender of any derivative leaſes.

Guardians in Socage, 2 Roll. Ab. 41.

§ 47. A guardian in ſocage may make leaſes for years in his own name, and the leſſee may maintain ejectment thereupon, for ſuch a guardian is *quaſi dominus pro tempore.* And a teſtamentary guardian or one appointed purſuant to the ſtatute 12 *Geo.* 2. c. 24. is the ſame in office and intereſt with a guardian in ſocage.

Executors and Adminiſtrators.

§ 48. Executors or adminiſtrators, as they may may diſpoſe abſolutely of terms for years veſted in them in right of their teſtators or inteſtates, ſo may they leaſe the ſame for any fewer number of years,

and the rent reſerved on ſuch leaſes will be aſſets in their hands, and go in a courſe of adminiſtration.

Who are incapable of making Leaſes.

§ 49. All perſons incapable of binding themſelves by contracts, ſuch as idiots, lunaticks, *&c.* are of courſe incapable of making leaſes.

Infants.

§ 50. An infant cannot make a leaſe of his lands, unleſs ſuch leaſe be evidently beneficial to him. And where no rent is reſerved, it has been held by ſome to be *ipſo facto* void; while others only look on it as voidable. It appears however to be ſettled, that if an infant makes a leaſe for years, he cannot plead *non eſt factum*, but muſt avoid it by pleading the ſpecial matter of his infancy; which ſeems to favour the opinion of thoſe who hold that the leaſe is not abſolutely void.

Bac. Ab. Tit. Leaſe (B)

§ 51. If an infant makes a leaſe reſerving rent, it is *prima facie* good, becauſe it is preſumed to be for his benefit. But ſuch leaſe is voidable by the infant, when he comes of age, or by his heir, if he dies under age.

§ 52. If a caſe of this kind were now to ariſe, the principle upon which its validity would depend, would be whether it was beneficial or not to the infant: as Lord *Mansfield* has obſerved, that very prejudicial leaſes may be made though a nominal rent be reſerved; and there may be moſt beneficial conſiderations for a leaſe, though no rent be reſerved; and that

3 Burr. R. 1806.

an

an infant may make a leaſe without rent, for the purpoſe of trying his title.

§ 53. Married women being diſabled by the common law, from making any diſpoſition of their poſſeſſions, cannot make leaſes, and therefore the ſtatute 32 *Hen* 8. enables huſbands ſeiſed in right of their wives to leaſe their lands, but if the circumſtances required by that ſtatute are not obſerved, ſuch leaſes are not binding on wives ſurviving their huſbands. And if the wives die in the lifetime of their huſbands, their heirs may avoid them. Married Women. Ante f. 2 Saund. 180. *n.* 9.

§ 54. There are many caſes in which leaſes made by perſons having only a particular eſtate in the lands leaſed become abſolutely void, by the death of the leſſor, and others where they are only voidable, by the perſons in remainder or reverſion. Of void and voidable Leaſes.

This diſtinction is frequently material, for where a leaſe becomes abſolutely void by the death of the leſſor, no acceptance of rent, or any other act by the perſon in remainder or reverſion will make it good: whereas if a leaſe be voidable only, acceptance of rent will operate as a confirmation of it. 1 Inſt. 211 *b.*

§ 55. All leaſes made by tenants in tail, which are not warranted by the ſtatute 32 *Hen.* 8. are voidable by the iſſue in tail. But if ſuch iſſue accept of rent or fealty from the leſſee, after the death of their anceſtor, or bring an action for recovery of the rent, or for waſte, theſe acts will operate as a confirmation 1 Inſt. 45 *b.*

of the leaſe, and the iſſue can never afterwards avoid it during their life.

Idem.

§ 56. With reſpect to leaſes made by tenants in tail, in purſuance of the ſtatute 32 *Hen.* 8. although they are binding on the iſſue in tail, yet upon the death of the leſſor without iſſue they are abſolutely determined; and therefore void as againſt the perſons in remainder and reverſion; ſo that no acceptance of rent by them, will operate as a confirmation of ſuch leaſes.

Doe v. Weller, 7 Term R. 478.

§ 57. Leaſes made by huſband and wife, of the wife's eſtate, though not conformable to the ſtatute 32 *Hen.* 8. are only voidable as to the wife, and therefore acceptance of rent after her huſband's death, will operate as a confirmation of ſuch leaſes.

Tit. Leaſe (C.)

2 Saund. R. 180. *n.* 9.

§ 58. It is ſaid in *Bacon's Abridgement* to be clearly agreed, that if a huſband ſeiſed of lands in right of his wife, make a leaſe thereof, it is only voidable by the wife after her huſband's death, and not void. But ſome doubts are raiſed reſpecting this doctrine by Mr. Serjeant *Williams* in his notes on *Saunders**.

§ 59. All leaſes made by tenants for life, become abſolutely void by their death; ſo that no acceptance of rent, or other act, by the perſons entitled to the

* With reſpect to the caſes in which leaſes by eccleſiaſtical perſons are void, or only voidable, vide *Bac. Ab.* Tit. Leaſe (H.)

remainder

remainder or reverſion, will operate as a confirmation of them.

§ 60. Tenant for life made a leaſe for 21 years, and died before the expiration of the term. The remainder-man ſuffered the tenant to remain in poſſeſſion four or five years, received rent regularly during that time, and then gave him notice to quit, and brought his ejectment. The queſtion was, whether this acceptance of rent by the remainder-man amounted to a confirmation of the leaſe, or whether, the leaſe being void, it was incapable of confirmation. Jenkins v. Church, Cowp. 482.

Lord *Mansfield.*—This is a void leaſe, and not voidable only; but if it were merely voidable, the acceptance of rent alone, unaccompanied with any other circumſtances, is not a ſufficient confirmation. It cannot be a confirmation, unleſs done with a knowledge of the title at the time, or unleſs the remainder-man lies by and ſuffers the tenant to lay out his money in improvements, in confidence of continuing tenant. But here, it is a void leaſe; and, in general, a void leaſe is incapable of confirmation.

§ 61. In a ſubſequent caſe, Lord *Mansfield* ſaid, that a leaſe which was void againſt a remainder-man, could not be ſet up by his acceptance of rent, and ſuffering the tenant to make improvements, after his intereſt veſted in poſſeſſion.

§ 62. Sir *Michael Newton* being tenant for life, remainder to truſtees to ſupport contingent remainders, Doe v. Butcher, Doug. 50.

remainder to his firſt and other ſons in tail, remainder to the leſſor of the plaintiff for life; Sir *Michael Newton* demiſed the premiſes for 99 years, if two perſons ſhould ſo long live. Sir *M. N.* died without iſſue, and the remainder-man received rent for ſeveral years from the leſſee, and alſo heriots; and the leſſee laid out conſiderable ſums of money, after the death of the leſſor, in improving the lands.

Lord *Mansfield* ſaid, there did not appear to have been any intention, either to confirm the old leaſe, or to grant a new one, both the leſſor of the plaintiff and the defendant had proceeded under a miſtake, and had ſuppoſed the original leaſe to be good.

Goodright v. Humphrys, cited, Doug. 52 *n.*

Judgment that the leaſe was not confirmed.

§ 63. The Court of Chancery has, however, held, that where a remainder-man accepted rent, and ſuffered the tenant to make improvements, knowing the defect in the leaſe, he ſhould execute a new leaſe to the tenant.

Stiles v. Cowper, 3 Atk. 692.

§ 64. A tenant for life made a leaſe of a houſe (under a power) for 61 years. The leſſee aſſigned over the premiſes to one *Stiles*, who rebuilt the houſe. Upon the death of the tenant for life, the remainder-man accepted rent during ſix years from the tenant, and, during that time, the tenant built new offices.

The remainder-man afterwards brought an ejectment againſt the tenant, and recovered the poſſeſſion at law, the

the leaſe not being made according to the directions in the power.

The tenant filed a bill in Chancery for an injunction to ſtay the defendant's proceedings at law, and to be quieted in the poſſeſſion of the houſe.

Lord *Hardwicke.*—"Though the acceptance of "rent under a leaſe by iſſue in tail will bind them, "where they claim *per formam doni* from the leſſor, "yet this alone will not bind the remainder-man in "tail, who claims the leaſehold eſtate by purchaſe: "but is a circumſtance, however, in favour of the "leſſee. And when the remainder-man lies by, and "ſuffers the leſſee or aſſignee to rebuild, and does "not, by his anſwer, deny that he had notice of it, "all theſe circumſtances together, will bind him from "controverting the leaſe afterwards."

It was decreed, that the defendant ſhould execute a new leaſe to the plaintiff.

§ 65. Where there is a proviſo inſerted in a leaſe, that upon nonpayment of the rent reſerved, on a certain day, the leaſe ſhall become abſolutely void; and the rent is not paid on the day appointed for that purpoſe in the leaſe, no acceptance of rent after will operate as a confirmation of the leaſe. 1 Inſt. 215 *a.* 3 Rep. 65 *a.*

§ 66. King *Philip* and Queen *Mary* demiſed the ſeat of the priory of *Ravenſton*, com. *Bucks*, to *T. Throckmorton*, for 70 years, rendering rent; with a pro- Finch v. Throckmorton, Cro. Eliz. 221. Poph. R. 25.

a proviſo, that upon nonpayment within 40 days after the day of payment, the leaſe ſhould ceaſe and be void. The rent was not paid within 40 days after *Mich.* 9 *Eliz.*; but, afterwards, the queen's receiver accepted it, and made an acquittance, as if it had been paid at the day, and received the rent regularly afterwards until 30 *Eliz.*, when the queen granted the land to Sir *Thomas Heneage*. The nonpayment of the rent in 9 *Eliz.* within the 40 days was found by office, upon which Sir *T. Heneage* entered. The caſe was argued ſeveral times in the Exchequer, and all the Barons agreed, 1ſt, That the leaſe became void immediately upon the nonpayment of the rent, for the words were, that, upon nonpayment, the leaſe ſhould ceaſe and be void; ſo that the land was diſcharged of the contract, and the patentee was no longer a termor, nor, as *Manwood* ſaid, a tenant at will or at ſufferance. 2d, That the acceptance of rent afterwards could not make a void leaſe good. A writ of error was brought before the Lord Keeper of the Great Seal, and the Lord Treaſurer, where the judgment was affirmed; and that upon this reaſon, for the proviſo ſhall be taken to be a limitation to determine the eſtate, and not a condition to undo the eſtate, which cannot be defeated in caſe of a condition, but by entry.

Poph. R. 53.

1 Inſt. 211 *b.*

§ 67. But where the proviſo is, that upon nonpayment of the rent, &c. the leſſor ſhall re-enter, there, if the leſſor accepts rent, after the breach of the condition, he cannot afterwards take advantage of it, unleſs he was ignorant of ſuch breach; in which caſe, acceptance

acceptance of rent will not bar him from entering and avoiding the leaſe.

§ 68. *John Pennant* made a leaſe for ten years, reſerving rent, in which was a condition, that if the leſſee aliened the lands without the aſſent of the leſſor, it ſhould be lawful for the leſſor or his heirs to re-enter. The leſſee aliened without licence, for which the leſſor entered. The leſſee ſaid, that before the re-entry, the leſſor accepted rent which became due after the alienation; to which, the leſſor replied, that, before the receipt of the rent, he had no notice of the alienation. Pennant's Caſe, 3 Rep. 64.

It was adjudged for the plaintiff.

§ 69. But where the leſſor has notice of the breach of a condition, and afterwards accepts of rent, it will operate as a waiver of the forfeiture, and a confirmation of the leaſe.

§ 70. In a leaſe for twenty-one years, there was a covenant that the leſſee ſhould not underlet, aſſign, or transfer the premiſes, without the aſſent of the leſſor; with a power of re-entry in caſe the leſſee did not obſerve the covenants. The leſſee underlet part of the premiſes, but with the knowledge of the leſſor, who accepted rent accrued after ſuch underletting. Goodright v Davids, Cowp. 803.

Lord *Mansfield*.—"This caſe is extremely clear; "to conſtrue this acceptance of rent due ſince the "condition

" condition broken, a waiver of the forfeiture, is to
" conſtrue it according to the intention of the parties.
" Upon the breach of the condition, the landlord
" had a right to enter; he had full notice of the
" breach, and does not take advantage of it, but
" accepts rent ſubſequently accrued; that ſhews he
" meant the leaſe ſhould continue. Caſes of for-
" feiture are not favoured in law; and where the for-
" feiture is once waived, the court will not aſſiſt it.

TITLE XXXII.

DEED.

CHAP. VIII.

Of an Exchange, Partition, Releaſe, and Confirmation.

§ 1. *Of an Exchange.*
4. *Implies a Warranty.*
5. *Can only be between two Parties.*
7. *Who may Exchange.*
8. *Of a Partition.*
11. *Of a Releaſe.*
13. *Operative Words.*
15. *Different Kinds of Releaſes.*
16. *Mitter L'Eſtate.*
20. *Mitter Le Droit.*
22. *By Enlargement.*
36. *By Extinguiſhment.*
39. *What may be Releaſed.*
42. *Of a Confirmation.*

Section 1.

Of an Exchange.

AN exchange is a mutual grant of equal intereſts, the one in conſideration of the other. This mode of conveyance was formerly much in uſe, as appears from the many deeds of exchange which Mr. *Madox* has inſerted in his *Formulare*.

§ 2. Lord *Coke* ſays, there are five circumſtances neceſſary to the validity of an exchange; 1ſt, The eſtates given muſt be equal in quantity of intereſt, though not in value; as fee ſimple, for fee ſimple; an eſtate for life, for an eſtate for life, *&c.* 2d, The word exchange, *excambium*, muſt be uſed, as it cannot be ſupplied by any other word, or by any circumlocution. 3d, There muſt be an execution of the exchange by entry or claim, in the lifetime of the parties,

parties, for by the exchange they have no freehold in deed or in law in them until it is executed by entry;

1 Inſt. 50 *b.* and therefore if one of them dies before entry, the exchange is void: for the heir cannot enter and take it as a purchaſer, becauſe he is named only to take by way of limitation of eſtate in courſe of * deſcent. 4th, If the things exchanged lay in grant, it muſt have been by deed. And now by the ſtatute 29 *Cha.* 2. c. 3. a writing is neceſſary, if the exchange is of freeholds, or of terms for years, being more than three years. 5th, If the lands exchanged lay in ſeveral counties there muſt have been a deed indented.

Lit. f. 62. § 3. An exchange is one of thoſe conveyances to the completion of which livery of ſeiſin is not neceſſary; for the entry of each upon the land acquired by the exchange is ſufficient evidence of the alteration of poſſeſſion.

Implies a Warranty. Buſtaid's Caſe, 4 Rep. 121. § 4. It was reſolved in 1 *Jac.* 1ſt, That in every exchange the word *excambium* implies in itſelf *tacitè* a condition, and alſo a warranty, the one to give reentry, and the other voucher and recompence, and all in reſpect of the reciprocal conſideration, the one land being given in exchange for the other. But it is a ſpecial warranty; for upon the voucher by force of it, he ſhall not recover other land in value, but that only which was by him given in exchange. For inaſ-

* If an exchange be made by leaſe and releaſe, this inconvenience is prevented as the ſtatute of uſes executes the poſſeſſion without entry, and all incidents annexed to an exchange at common law will be preſerved.

much

much as the mutual conſideration is the cauſe of the warranty, it ſhall therefore extend only to land reciprocally given, and not to other land; and this warranty runs only in privity, for none ſhall vouch by force of it, but the parties to the exchange, or their heirs, and no aſſignee.

2d, That if *A.* gives in exchange three acres to *B.* for other three acres, and afterwards one acre is evicted from *B.*, in that caſe, the whole exchange is defeated, and *B.* may enter into all his land: for, although the exchange had been good if *A.* had given but two acres, or but one acre, or leſs, yet, foraſmuch as all the three acres were given in exchange for the others, and the condition which was implied in the exchange was entire, upon the eviction of one acre, the condition, in law, was broken, and therefore entry given into the whole.

3d, That as, when the whole eſtate in part was evicted the exchange was defeated; ſo, when an eſtate of freehold for life, which was but parcel of the eſtate, was evicted, the exchange was defeated.

§ 5. *Littleton* ſpeaks of an exchange as of a tranſaction between two; and Mr. *Hargrave* obſerves, that, in a late caſe, it was held, that an exchange, in the ſtrict legal ſenſe of the word, could not be between three, the principle of it not being applicable to more than two diſtinct contracting parties, for want of the mutuality and reciprocity on which its operation ſo entirely depends. For, firſt, the conſideration of an exchange,

Can only be between two Parties, 1 Inſt. 50 *b.* *n.* 1. 3 Wilſ. R. 489.

exchange, and the implied warranty incident to it, is the receiving ſomething with warranty from the ſame perſon, to whom ſomething with warranty is given; but if there could be three diſtinct parties, each would give to one, and receive from another. Secondly, the implied condition of re-entry is, that the re-entry may be made on him whoſe title fails; but if there could be three parties to an exchange, then each perſon would be liable to re-entry for the fault of another's title, as well as of his own.

1 Inſt. 51 *a.* n. 1.

§ 6. But although there cannot be more than two diſtinct parties to an exchange, yet there may be more than two perſons. Thus, Lord *Coke* ſays, that an exchange between two joint-tenants and two tenants in common is good; for, although four perſons are named, yet they conſtitute only two diſtinct parties: in point of intereſt, the two joint-tenants are the conveying parties on the one ſide, and the two tenants in common on the other; and, conſequently, there is the ſame reciprocity, as if the tranſaction was between two perſons only. The ſame obſervation applies to any number of perſons, if ſo conjoined in the mutuality of giving and receiving in exchange, as to make only two diſtinct relative parties.

Who may exchange.

§ 7. All perſons capable of conveying away their lands, may, of courſe, exchange them for others; and if an infant exchanges lands, and enters on thoſe acquired by the exchange, and continues to hold them after he attains his full age, the exchange is become perfect, for it was not originally void,

1 Inſt. 51 *b.*

void, becauſe the entry was equivalent to livery, and alſo in reſpect of the recompence, but only voidable.

§ 8. A partition is a deed by which two or more joint-tenants, coparceners, or tenants in common, divide the lands ſo held among them into ſeparate and ſeveral parts, each taking a diſtinct part in ſeveralty. Here, as in ſome inſtances, there is a unity of intereſt, and, in all, a unity of poſſeſſion, it is neceſſary that they ſhould all mutually convey and aſſure to each other, the ſeveral eſtates which they are to take in ſeveralty under the partition. Of a Partition.

§ 9. By the common law, coparceners being compellable to make partition, might have made it by parol only, but joint-tenants, and tenants in common, muſt have done it by deed; and, in both caſes, the conveyances muſt have been perfected by livery of ſeiſin. But the ſtatute of frauds has now aboliſhed this diſtinction, and made a deed equally neceſſary in all caſes.

§ 10. Every partition implies, and has annexed to it, a warranty in law; and, in all modern deeds of partition, there are mutual covenants for the title. Vide Tit. 19. ſ. 31.

§ 11. By the common law, where a man had the actual poſſeſſion and right of property in lands, he could only convey them by feoffment, with livery of ſeiſin; but, as it frequently happened, that the actual poſſeſſion was in one perſon, and the right of poſſeſſion or right of property in another, in caſe the perſon who had the right of poſſeſſion or right of property was willing to convey thoſe rights Of a Releaſe, Gilb. Ten. 53.

rights to the perſon who had the actual poſſeſſion, it was done by a diſcharge of his right to the perſon in poſſeſſion; which ſpecies of conveyance acquired the name of a releaſe. A feoffment would, in ſuch a caſe, have been uſeleſs, becauſe it could not transfer the poſſeſſion, as the perſon was in poſſeſſion already.

Gilb. Ten. 53. § 12. A releaſe is, therefore, a conveyance of a right, to a perſon in poſſeſſion. Thus, where a man was diſſeiſed, the diſſeiſor acquired the poſſeſſion, and Tit. 29. c. 1. f. 4. the right of poſſeſſion and property remained in the diſſeiſee. Now, if the diſſeiſee agreed to transfer his rights to the diſſeiſor, the proper mode of carrying ſuch an agreement into execution was, by a releaſe; for the diſſeiſor being already in poſſeſſion, it would have been uſeleſs to have made him a feoffment.

Operative Words. 1 Inſt. 264 *b.* § 13. The operative words of a releaſe are, *remiſiſſe relaxaſſe et quietum clamaſſe*: remiſe, releaſe, and for ever quit claim. Beſides which, there are other words, ſuch as *renuntiare*, *acquietare*. And, where a leſſor granted to a leſſee for life, that he ſhould be diſcharged of the rent, this was held to amount to a releaſe.

Lit. f. 508. 1 Inſt. 291 *b.* § 14. *Littleton* ſays, that a releaſe of all demands is the beſt and ſtrongeſt releaſe: and Lord *Coke* obſerves, that the word demand is the ſtrongeſt word in the law, except the word claim; and that a releaſe of all demands diſcharges all ſorts of actions, rights, and titles, conditions, before and after breach, executions, appeals, rents of all kinds, covenants, contracts, recognizances, ſtatutes, *&c.*

§ 15. Releaſes

§ 15. Releaſes of land, in reſpect to their operation, are divided into four ſorts. 1ſt, Releaſes that enure by way of *mitter L'Eſtate.* 2d, Releaſes that enure by way of *mitter Le Droit.* 3d, Releaſes that enure by enlargement. And, 4th, Releaſes that enure by extinguiſhment.

Different Kinds of Releaſes. 1 Inſt. 193 *b.* 273 *b.*

§ 16. When two or more perſons become ſeiſed of the ſame eſtate by a joint title, either by contract or deſcent, as joint-tenants, or coparceners, and one of them releaſes his right to the other, ſuch releaſe is ſaid to enure by way of *mitter L' Eſtate.* For where two ſeveral perſons come in by the ſame feudal contract, one of them may diſcharge to the other the benefit of ſuch contract, by a releaſe; becauſe no notoriety is needful, for there was a ſufficient notoriety in the prior feudal contract. Thus, two coparceners come into one entire feud, deſcending from their anceſtor, and, therefore, they may releaſe privately to each other, becauſe they take by the former deſcent, which eſtabliſhed them in poſſeſſion, without any notoriety. But ſince coparceners do alſo tranſmit diſtinct eſtates to their children, they may alſo paſs their eſtates by diſtinct feoffments.

Mitter L' Eſtate. Lit. ſ. 304. 1 Inſt. 273 *b.* Gilb. Ten. 72. Tit. 19.

§ 17. As to joint-tenants, they can only paſs their eſtates to one another by releaſe, for they all come in by the firſt feudal contract; and, therefore, a ſecond feoffment cannot give any farther title or notoriety, becauſe every perſon is ſuppoſed to be in by his elder title, which, in the caſe of joint-tenants, is the original

Idem. Tit. 18. ch. 2. ſ. 20.

ginal feoffment, ſo that a ſecond feoffment would be uſeleſs.

1 Inſt. 273 *b.*

§ 18. In conſequence of this privity, which muſt neceſſarily exiſt in releaſes that enure by way of *mitter L'Eſtate*, a fee will paſs by ſuch a releaſe without any words of limitation; for the parties are not in by the releaſe, but by the original feudal contract, which paſſed an inheritance, and the releaſe only diſcharges the pretenſions of one of them; ſo that, where one joint-tenant or coparcener releaſes to the other, the releaſee is in by the original conveyance, and ſuch releaſe is not conſidered as an alienation, nor does it make a degree.

Tit. 20.

§ 19. One tenant in common cannot releaſe to his companion, becauſe they have diſtinct freeholds, but they muſt paſs their eſtates by feoffment and livery of ſeiſin; for, as they were created by different acts, and different liveries, they muſt alſo paſs to each other by diſtinct liveries.

Mutter Le Droit. Lit. ſ. 466. Gilb. Ten. 55.

§ 20. Releaſes are ſaid to enure by way of *mitter Le Droit*, where a perſon who has been diſſeiſed releaſes to the diſſeiſor, or to the heir or feoffee of the diſſeiſor, who, being in poſſeſſion, is therefore capable of taking a releaſe of the right. And as, in caſes of this kind, nothing but the bare right paſſes, the releaſe is ſaid to enure by way of *mitter le Droit*.

Lit. ſ. 467.

§ 21. No words of limitation are neceſſary in a releaſe that enures by way of *mitter le droit;* for if a releaſe

releaſe of right be made to a perſon ſeiſed in fee, for a day, or an hour, it will be as ſtrong as if it were made to the releaſee and his heirs for ever.

By Enlargement. Lit. ſ. 465. 1 Inſt. 272 *b.*

§ 22. Releaſes enure by way of enlargement of eſtate, when the poſſeſſion and inheritance are ſeparated for a particular time; and he who has the reverſion and inheritance, releaſes all his right and intereſt in the lands to the perſon who has the particular eſtate: ſuch releaſes are ſaid to enure by way of enlargement, and to amount to a grant and attornment, becauſe they transfer the legal eſtate as effectually to the releaſee, as a feoffment with livery.

§ 23. To render this conveyance effectual, it is neceſſary that there ſhould be a privity of eſtate between the releaſor and releaſee; and alſo, that the releaſee ſhould have ſuch an eſtate as is capable of being enlarged.

§ 24. With reſpect to privity of eſtate, if a perſon makes a leaſe for years, the leſſee is, of courſe, capable of taking a releaſe from the leſſor, becauſe there is a privity between them. 1 Inſt. 273 *a.*

Idem.

§ 25. If *A.* makes a leaſe to *B.* for life, and the leſſee makes a leaſe for years, and, afterwards, *A.* releaſes to the leſſee for years, it will not enlarge his eſtate, becauſe there is no privity between *A.* and the leſſee for years. So, if a perſon makes a leaſe for 20 years, and the leſſee makes a leaſe for 10 years, if the firſt

leſſor releaſes to the ſecond leſſee, his releaſe will be void for want of privity.

Lit. ſ. 460. 1. 1 Inſt. 270 *b.*

§ 26. A releaſe to a tenant at will operates ſo as to enlarge his eſtate, becauſe there is a privity between him and the leſſor. But a releaſe to a tenant at ſufferance is void, for want of privity.

1 Inſt. 270 *a.* n. 3.

§ 27. Lord *Coke* ſays, that a releaſe which enures by way of enlargement, cannot work without a poſſeſſion. But this muſt be underſtood to mean, not that an actual eſtate in poſſeſſion is neceſſary, but that the releaſee has an eſtate actually veſted in him, at the time of the releaſe, which is capable of being enlarged by ſuch releaſe.

Idem.

§ 28. Thus, Lord *Coke* ſays, if a tenant for 20 years in poſſeſſion make a leaſe to *B.* for five years, and *B.* enters, a releaſe to the firſt leſſee is good, for he had an actual poſſeſſion, and the poſſeſſion of his leſſee is his poſſeſſion: and ſo it is, if a man makes a leaſe for years, the remainder for years, and the firſt leſſee doth enter, a releaſe to him in remainder for years is good to enlarge his eſtate.

1 Inſt. 270 *b.*

§ 29. Lord *Coke* alſo ſays, if a man make a leaſe for life, remainder for life, and the firſt leſſee dies, a releaſe to him in the remainder is good, before he enters, to enlarge his eſtate; for that he has an eſtate of freehold in law in him, which may be enlarged by releaſe, before entry.

§ 30. It

§ 30. It ſhould, however, be obſerved, that if a perſon makes a leaſe for years, and the leſſor releaſes all his right to the leſſee, before entry, ſuch releaſe is void, and will not enlarge his eſtate; for the leſſee, before entry, had neither a poſſeſſion, nor a veſted eſtate, but only an *intereſſe termini.* Lit. ſ. 459. 1 Inſt. 270 *a.* Tit. 8. ch. 1. ſ. 14.

§ 31. A releaſe to a *ceſtui que uſe* by the feoffees to uſes, was held by *Littleton* to be ſufficient to enlarge his eſtate; becauſe the *ceſtui que uſe* was tenant at will to the feoffees, and there was a privity between them. From which, it may be concluded, that a releaſe to a *ceſtui que* truſt by the truſtee, would now operate to enlarge his eſtate. Lit. ſ. 462, 3, 4. 1 Inſt. 271 *a.*

§ 32. A releaſe to a tenant by ſtatute merchant, ſtatute ſtaple, or eligit, will operate to enlarge the eſtate. 1 Inſt. 270 *b.*

§ 33. Lord *Coke* ſays, if a feme covert be tenant for life, a releaſe to the huſband will be good; for there is both privity and an eſtate in the huſband, whereupon the releaſe may ſufficiently enure by way of enlargement: for, by the intermarriage, the huſband acquired a freehold in his wife's right. 1 Inſt. 273 *b.*

§ 34. Releaſes which operate by way of enlargement, require the ſame technical words of limitation as feoffments or grants: for, if a leſſor releaſes to his leſſee for years all his right in the lands, this will only paſs an eſtate for life. Lit. ſ. 465.

1 Inſt. 273 *b.*

§ 35. Lord *Coke*, however, ſays, that if a man makes a leaſe to *A.* for term of the life of *B.*, and afterwards releaſes to *A.* all his right in the land, *A.* will take an eſtate for his own life: becauſe an eſtate for a man's own life is higher, in judgment of law, than an eſtate for the life of another.

Extinguiſhment.
Lit. f. 479, 480.
1 Inſt. 280 *a.*

§ 36. In ſome caſes, where the releaſe cannot enure by way of *mitter le Droit*, it will operate by way of extinguiſhment. Thus, if a lord releaſes his ſeignory to the tenant, or if the grantee of a rent or common, releaſes it to the terre-tenant, theſe releaſes are ſaid to operate by way of extinguiſhment of the ſervices, the rent, or the common; becauſe the tenant cannot have ſervices or rent to receive of himſelf; nor can he take common in his own land.

1 Inſt. 270 *a.*

§ 37. If a man makes a leaſe for years to begin preſently, reſerving rent, and, before the leſſee enters, the leſſor releaſes all his right in the land, although this cannot enure to enlarge his eſtate, yet it ſhall operate to extinguiſh the rent.

Ante f. 30.

S. 470.

§ 38. *Littleton* ſays, if a tenant for life lets the land over to another for term of the life of the leſſee, remainder to another in fee, and the leſſor releaſes to the perſon to whom the tenant made the leaſe, the leſſor will be thereby for ever barred, although no mention is made of his heirs: for, at the time of the releaſe made, the leſſor had no reverſion, but only a right to have the reverſion. And Lord *Coke*, in his comment on this paſſage, obſerves, that the releaſe to the leſſee does

does not enure by way of *mitter le Droit*, for then ſhould he have the whole right, but by way of extinguiſhment, in reſpect of him that made the releaſe, and that it ſhall enure to him in remainder.

§ 39. With reſpect to the things that may be releaſed, it is a rule of law, that no poſſibility, right, title, or thing in action, ſhall be granted or aſſigned to ſtrangers, for that would be the occaſion of multiplying contentions and ſuits. What may be Releaſed. Lampet's Caſe, 10 Rep. 46.

§ 40. Hence it is ſaid by *Littleton*, that a ſon cannot releaſe to his father's diſſeiſor, in the lifetime of the father, becauſe he has no right to the land during the life of his father; and, therefore, in ſuch a caſe, the ſon may enter on the land, againſt his own releaſe. f. 446. 1 Inſt 265 *a*.

§ 41. But although a mere poſſibility cannot be releaſed to a ſtranger, yet all rights, titles, and actions, may be releaſed to the terre-tenant, for ſecuring his repoſe and quiet, and for avoiding contentions and ſuits; and, therefore, a right or title to an eſtate of freehold, be it *in præſenti* or *futuro*, may be releaſed in five manners. 1ſt, To the tenant of the freehold in fact or in law, without any privity. 2d, To the perſon in remainder. 3d, To the perſon who is ſeiſed of the reverſion, without any privity. 4th, To the perſon who has right only in reſpect of privity; as, if the tenant be diſſeiſed, the lord may releaſe his ſervices, in reſpect of the privity and right, without any eſtate. 5th, In reſpect of privity only, without right, 10 Rep. 48 *a*.

as if tenant in tail makes a feoffment in fee, the donee, after the feoffment, has no right, and yet, in reſpect of the privity only, the donor may releaſe to him the rent and all ſervices, ſaving fealty.

Of a Confirmation.
1 Inſt. 295 *b.* Gilb. Ten 75.

§ 42. A confirmation is of a nature nearly allied to a releaſe. Lord *Coke* defines it to be, "a conveyance of an eſtate or right *in eſſe*, whereby a voidable eſtate is made ſure and unavoidable, or whereby a particular eſtate is encreaſed."

Sect. 520.

§ 43. The proper technical words of a confirmation are, ratify, approve, and confirm: and *Littleton* ſays, that *confirmare idem eſt quod firmum facere.*

Sect. 531.

§ 44. The words *dedi et conceſſi* have the ſame effect in ſome caſes as the word *confirmare.* Thus, if a diſſeiſee conveys to the diſſeiſor by the word *dedi*, or *conceſſi*, it will operate as a confirmation.

§ 45. The firſt part of the definition of a confirmation, may be illuſtrated by the following caſe: Where a tenant for life makes a leaſe for 20 years, and dies during the term, if the reverſioner confirms the leaſe during the life of the tenant for years, it will be no longer voidable.

1 Inſt. 296 *a.*

§ 46. As to the latter branch of the definition, whenever a confirmation operates by way of increaſing the eſtate, it is ſimilar in all reſpects to that kind of releaſe which operates by way of enlargement, for there muſt be a privity of eſtate, and proper words of limitation.

§ 47. In

§ 47. In the caſe of a diſſeiſin, a confirmation by the diſſeiſee to the diſſeiſor, of his eſtate, will give him a fee-ſimple, without the word heirs. And it would be the ſame, if the eſtate of the diſſeiſee had been confirmed for a day or an hour only. But if a diſſeiſor makes a leaſe for 100 years, the diſſeiſee may confirm parcel of theſe years by apt words, without confirming the whole. Lit. ſ. 519, 20. 1 Inſt. 297 a.

§ 48. Mr. *Butler* has obſerved upon this paſſage, that the diſtinctions taken here by Lord *Coke* are, that a confirmation of a tenant of freehold or inheritance cannot be ſo worded as to have a leſs operation than that of confirming his whole eſtate: conſequently, a confirmation to ſuch a tenant, either of the lands or of his eſtate in them, for any term or period, is a confirmation of his whole fee. A diſſeiſor always acquires by the diſſeiſin a tortious fee-ſimple; a confirmation, therefore, to him, however qualified, is a confirmation of his whole fee. It is otherwiſe in the caſe of a term of years; a confirmation may be made of part of the term only. The reaſon of this difference is, that an eſtate of freehold, or of inheritance, is conſidered as integral and indiviſible. But as years are ſeveral, the term which is compoſed of them, is neceſſarily fractional and diviſible, and may conſequently be confirmed in part only, by uſing proper expreſſions for this purpoſe. If a perſon confirms the *eſtate* of the tenant for years for part of the term, as the word eſtate ſignifies all the intereſt or term of years which the tenant has, the ſubſequent words are not conſidered as qualifications of the former words, but as abſolutely repugnant Id. n. 1.

to

to them; and as both cannot ſtand together, the law prefers the firſt, which are the principal, to the other, which are only ſecondary.

Sect. 524. § 49. *Littleton* ſays, if a man lets land to another for life, and after confirms his eſtate which he hath in the ſame land, to hold his eſtate to him and his heirs, this confirmation to his heirs is void, for his heirs cannot have his eſtate, which was but for term of his life. But if he confirms his eſtate by theſe words, to have the ſame land to him and his heirs, this confirmation will give him an eſtate in fee-ſimple; becauſe it applies to the land, and not to the eſtate in the land.

1 Inſt. 295 *b.* § 50. Lord *Coke* ſays, that a confirmation doth not ſtrengthen a void eſtate; *confirmatio eſt nulla, ubi donum præcedens eſt invalidum, et ubi donatio nulla omnino, nec valebit confirmatio:* for a confirmation may make a voidable or defeaſible eſtate good, but it cannot work upon an eſtate that is void in law.

TITLE XXXII.

DEED.

CHAP. IX.

Of a Surrender, Aſſignment, and Defeazance.

§ 1. *Of a Surrender.*
3. *No technical Words neceſſary.*
4. *Nor Livery of Seiſin.*
5. *Muſt be in Writing.*
8. *What Eſtate neceſſary.*
§ 15. *Of an Aſſignment.*
18. *No technical Words neceſſary.*
20. *Muſt be by Deed.*
21. *What may be aſſigned.*
24. *Of a Defeazance.*

Section 1.

A SURRENDER, *ſurſum redditio*, is of a nature directly oppoſite to a releaſe; for, as that operates by the greater eſtate deſcending upon the leſs, a ſurrender is the falling of a leſs eſtate into a greater by deed. Of a Surrender.

Lord *Coke* defines it to be, a yielding up of an eſtate for life or years, to him that hath an immediate eſtate in reverſion or remainder, wherein the eſtate for life or years may drown, by mutual agreement between them. 1 Inſt. 337 *b.*

§ 2. It has been held, after great conſideration, that a ſurrender immediately diveſts the eſtate out of the ſurrenderors, and veſts it in the ſurrenderee; for this is a conveyance at common law, to the perfection of which, Thompſon v. Leach, 2 Salk. 618.

which, no other act but the bare grant is neceſſary; and, though it be true that every grant is a contract, and there muſt be an *actus contra actum*, or a mutual conſent, yet that conſent is implied. A gift imports a benefit, and an *aſſumpſit* to take a benefit may well be preſumed: and there is the ſame reaſon why a ſurrender ſhould veſt the eſtate before notice or agreement, as why a grant of goods ſhould veſt a property; or ſealing a bond to another in his abſence, ſhould be the obligee's bond immediately, without notice.

No technical Words neceſſary.

Perk. ſ. 607.

§ 3. The technical and proper words of a ſurrender are, ſurrender and yield up. But any form of words by which the intention of the parties is ſufficiently manifeſted, will operate as a ſurrender. Thus, if a leſſee for years remiſe, releaſe, diſcharge, and for ever quit claim his leſſor all his right, title, or intereſt, in or to ſuch lands, it will amount to a ſurrender. So, if a leſſee for life leaſes to the leſſor for the life of the leſſee, this is a ſurrender.

2 Roll Ab. 497.

Nor Livery of Seiſin.

§ 4. In a ſurrender, there is no occaſion for livery of ſeiſin, becauſe there is a privity of eſtate between the ſurrenderor and ſurrenderee; for the particular eſtate of the one, and the remainder of the other, are, in fact, one and the ſame eſtate; and livery having been once made at the creation of it, there can be no neceſſity for a ſecond livery.

Muſt be in Writing.

§ 5. By the ſtatute 29 *Cha.* 2. c. 3. it is enacted, that no leaſe, eſtate, or intereſt of freehold, or term of years, or any uncertain intereſt, not being copy-hold,

hold, ſhall be ſurrendered, unleſs by deed or note in writing, ſigned by the parties ſurrendering the ſame, or his agent thereunto lawfully authorized, in writing.

§ 6. It was held by Lord Chief Baron *Gilbert*, that upon the true conſtruction of this ſtatute, a leaſe for years cannot be ſurrendered by cancelling the indenture. Becauſe the intent of the ſtatute was, to take away the manner they formerly had of transferring intereſts in lands, by ſigns, ſymbols, and words only; and therefore as livery of ſeiſin on a parol feoffment was a ſign of paſſing the freehold, before the ſtatute, but is now taken away by the ſtatute, ſo the cancelling of a leaſe was a ſign of a ſurrender, before the ſtatute, but is now taken away, unleſs there be a writing under the hand of the party. And the words, by act and operation of law, are to be conſtrued a ſurrender in law, by the taking a new leaſe, which being in writing, is of equal notoriety with a ſurrender in writing.

Magenis v. Maculloch, Gilb. R. 236.

§ 7. It was held in a modern caſe, that the ſtatute of frauds does not make a deed abſolutely neceſſary to a ſurrender; but that a note in writing will have the ſame effect.

Farmer v. Rogers, 2 Wilſ. R. 27. Smith v. Mapleback, 1 Term R. 441.

§ 8. To make a ſurrender good, the perſon who ſurrenders muſt be in poſſeſſion, and the perſon to whom the ſurrender is made, muſt have a greater eſtate immediately in remainder or reverſion, in which the

What Eſtate neceſſary.

Perk. ſ. 589. the eſtate ſurrendered may merge. A tenant for life cannot therefore ſurrender to a tenant for years.

§ 9. It was formerly doubted whether a leſſee for years could ſurrender to a perſon who had the reverſion only for years; but this point appears to have been ſettled by a determination in 35 *Eliz.*, in which it was laid down, 1ſt, That if the term in reverſion be greater than the term in poſſeſſion, the greater will merge in the leſs; as ten years may be ſurrendered and merge in twelve or fourteen years. 2d, That though the reverſion be for a leſs number of years, yet the ſurrender will be good, and the firſt term merged. As if one were leſſee for twenty years, and the reverſion expectant thereon was granted to another for a year, who granted it over to the leſſee for twenty years, that this would operate as a ſurrender of the twenty years term, as if he had taken a new leaſe from his leſſor for one year; for the reverſionary intereſt coming to the poſſeſſion, drowns it, and the number of years is not material, for as he may ſurrender to him who hath the reverſion in fee, ſo he may to him who hath the reverſion for any leſs term. And therefore *Popham* held, that where leſſee for twenty years, makes a leaſe for ten years, and the leſſee for ten years ſurrenders to his leſſor, *viz.* the leſſee for twenty years, that this is good; and the leſſor ſhall have ſo many of the years as were then to come of his former term of twenty years, that is, as it ſeems, ſo many years as were to come of his reverſion, ſhall now be changed into poſſeſſion. And he held

Hughes v. Robotham, Cro. Eliz. 302. Poph. 31. Bac. Ab. Tit. Leaſe (S. 2.)

held further, that if ſuch leſſee for twenty years had made ſuch leaſe for ten years, and then granted over the reverſion for ten years only, *viz.* no longer than the leaſe for ten years was to continue, and ſuch leſſee for ten years had attorned, then the grantee of the reverſion ſhould have the rent and ſervices; and the grantor the reſidue of the twenty years. And that the leſſee for ten years might ſurrender to the grantee of the reverſion for ten years; and he thereby would have in poſſeſſion, ſo many years as were then to come of his reverſion. And if he had a leſs term in the reverſion, than the leſſee himſelf had in the poſſeſſion, it ſhould go to the benefit of the firſt termor for twenty years, who was his grantor; for the term in poſſeſſion was quite gone and drowned in the reverſion, to the benefit of thoſe who had the reverſion thereupon, having regard to their eſtate in reverſion, and not otherwiſe.

§ 10. An eſtate at will is not ſurrenderable, becauſe it is at the will of both parties, and either party may determine his will without the formality of a ſurrender; and therefore there is no ſurrender in law of an eſtate at will, between common perſons. 12 Mod. 79.

§ 11. A ſurrender can only be made by a perſon who is in poſſeſſion; and therefore if a leſſee for life or years, be ouſted by a ſtranger, and afterwards ſurrenders to his leſſor, it will be void; becauſe he had but a right at the time of the ſurrender. Perk. ſ. 599, 600.

§ 12. So

Idem. § 12. So if a woman has a title to dower, and ſhe ſurrenders to the perſon againſt whom ſhe ought to have dower, it is a void ſurrender.

Perk. ſ. 601. § 13. In conſequence of this principle, a leaſe for years, to commence at a future day, cannot be ſurrendered before it commences; for there is nothing in the leſſee, in poſſeſſion, before the commencement. Nor has the leſſor a reverſion before that time, but is poſſeſſed of the land in demeſne.

§ 14. To make a ſurrender good, there muſt be a privity of eſtate between the ſurrenderor and the ſurrenderee. Thus it is ſaid in *Plowden*, that if a tenant for thirty years makes a leaſe for ten years, and the leſſor and leſſee join in a ſurrender to the perſon in reverſion in fee, the ſurrender is good for both the eſtates; and yet the leſſee for ten years, could not ſurrender by himſelf, for want of privity; but when the other joined with him, his ſurrender ſhall be taken in law to precede, and the ſurrender of the leſſee for twenty years to follow, ſo that the ſame ſhall be good.

541.

Of an Aſſignment. § 15. An aſſignment is properly a transfer or making over to another, of the intereſt or eſtate which the aſſignor has in lands or tenements. But it is uſually applied to the transfer of a term for years. And it differs from a leaſe only in this circumſtance, that by a leaſe, the leſſor conveys an intereſt leſs than his own, reſerving to himſelf a reverſion. Whereas

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in an aſſignment, the aſſignor parts with his whole intereſt and property in the thing aſſigned, and puts the aſſignee in his place.

§ 16. Where a perſon conveys away all his term, but reſerves rent to himſelf, this is not an aſſignment.

§ 17. *A.* having a term for years, whereof one year and three quarters was to come, agreed with *B.* that he ſhould have the premiſes for the remainder of the term, paying the ſame rent to *A.* as was reſerved upon the original leaſe. It was held that this was an underleaſe, and not an aſſignment. Poulteney v. Holmes, Stra. R. 405.

§ 18. The proper and technical words of an aſſignment are—aſſign, transfer, and ſet over; but the words give, grant, bargain, and ſell, or any other words which ſhew the intention of the parties to make a complete transfer, will amount to an aſſignment. No technical Words neceſſary.

§ 19. There needs no conſideration to ſupport an aſſignment by a tenant for years, for the tenure and attendance, and the being ſubject to forfeiture, as alſo the payment of rent, if there is any, is ſufficient to veſt the term in the aſſignee. 1 Mod. 263.

§ 20. Previous to the ſtatute of frauds and perjuries, all chattels real might have been aſſigned without deed. But it is enacted by that ſtatute, that no leaſes, eſtates, or intereſt, either of freehold, or term for years, or any uncertain intereſt in lands, ſhall be Muſt be by Deed.

aſſigned, unleſs by deed or note in writing, ſigned by the party or his agent, lawfully authorized by writing.

What may be aſſigned.

§ 21. Every eſtate and intereſt in lands and tenements, may be aſſigned, as alſo every preſent and certain eſtate or intereſt, in incorporeal hereditaments, ſuch as rents, advowſons, *&c.* and even though the intereſt be future, as a term for years, to commence at a ſubſequent period, it may be aſſigned; for the intereſt is veſted *in præſenti*, though it is only to take effect *in futuro*.

Perk ſ. 91.

§ 22. It ſhould however be obſerved, that no right of entry or re-entry can be aſſigned, ſo that if a perſon be diſſeiſed, and aſſigns over his right to another, before he has entered on the diſſeiſor, ſuch aſſignment is void. Lord *Coke* ſays, that this doctrine is founded on a principle of the common law, that nothing in action, entry or re-entry, can be granted over; for ſo under colour thereof, pretended titles might be granted to great men, whereby right might be trodden down, and the weak oppreſſed.

Lit. ſ. 347.

1 Inſt. 214 *a.*

§ 23. In modern times, however, property only recoverable by ſuit at law, is conſtantly aſſigned, though in compliance with the ancient principle, the form of aſſigning a choſe in action is in the nature of a declaration of truſt, and an agreement to permit the aſſignee to make uſe of the name of the aſſignor, in order to recover the poſſeſſion. And therefore when a debt or bond is ſaid to be aſſigned, it muſt ſtill be

2 Inſt. 232 *b.* *n.* 1.

be ſued in the original creditor's name; the perſon to whom it is transferred being rather an attorney than an aſſignee, and our courts of equity, conſidering that in a commercial country much property muſt lie in contract, will protect the aſſignment of a choſe in action, as much as the law will that of a choſe in poſſeſſion.

§ 24. A defeazance is a collateral deed, made at the ſame time with a feoffment or grant, containing certain conditions, upon the performance of which, the eſtate created by ſuch feoffment or grant, may be defeated. The word is derived from the *French*, *defaire*, to defeat or undo, *infectum reddere quod factum eſt*. A defeazance executed at the ſame time with a feoffment, was conſidered as a part of it, and therefore allowed; but no ſubſequent ſecret revocation of a ſolemn conveyance, executed by livery of ſeiſin, was formerly permitted.

Of a Defeazance. Shep. T. 395.

1 Inſt. 236 *b*.

§ 25. As to things that were merely executory, or to be completed by matter ſubſequent, as rents, conditions, warranties, &c. they were always liable to be defeated by defeazances made ſubſequent to the time of their creation.

1 Inſt. 237 *a*.

§ 26. The difference betwen a defeazance and a condition is, that a condition is inſerted in the deed by which the eſtate is created, and a defeazance is a ſeparate deed, executed at the ſame time with the original deed.

§ 27. A defeazance muſt be made *in eodum modo*, and by matter as high as the thing to be defeated. So that if the one be by deed the other muſt be ſo alſo. And where the defeazance recites the deed, which it is meant to defeat (as it always does) it muſt recite it truly.

TITLE XXXII.

DEED.

CHAP. X.

Of a Bond and Recognizance.

§ 1. *Of a Bond.*
11. *Effects of a Bond as to the Obligor.*
12 *As to his Heir.*
15. *Statute of Fraudulent Deviſes.*
§ 17. *Where the Remedy may exceed the Penalty.*
19. *Aſſignable.*
20. *Of a Recognizance.*

Section 1.

Of a Bond.

A BOND or obligation is a deed, whereby the obligor binds or obliges himſelf, his heirs, executors, and adminiſtrators, to pay a certain ſum of money to the obligee, at a particular day. If this be all, the bond is called a ſimple one, *ſimplex obligatio*. But there is generally a condition added, that if the obligor does ſome act, the obligation ſhall be void, or elſe ſhall remain in full force; as payment of rent, performance of covenants in a deed, or repayment of a principal ſum of money, borrowed of the obligee, with intereſt; which principal ſum is uſually one half of the penal ſum ſpecified in the bond.

§ 2. There are only three things eſſentially neceſſary to the making of a bond or obligation, 1ſt, Writing on paper or parchment. 2d, Sealing; and, 3d, Delivery. For as to ſigning, that circumſtance was

2 Salk. 462. clearly not neceſſary in former times, and the ſtatute of frauds does not ſeem to extend to the caſe of a bond.

Cro. Eliz. 56. 729. 886. § 3. The law does not require any particular form of words as eſſentially neceſſary to conſtitute a bond, but any words which ſhew the intention of the party to bind himſelf will be ſufficient, for ſuch obligation is only in the nature of a contract, or a ſecurity for the performance of a contract, which is conſtrued according to the intention of the parties.

Cro. Jac. 203. 208. § 4. It has been held in a variety of caſes, that a ſeeming *Latin* word, not properly expreſſing the *quantum* of the ſum in which the party intended to be bound, ſhould, notwithſtanding, be ſo conſtrued as to anſwer the intention of the parties, rather than the obligation ſhould be void.

Cromwell v. Grumſden, 1 Ld. Ray. 335.

Cro. Ja. 607. § 5. It is the ſame, if there be an evident miſtake in the *Engliſh* word expreſſing the ſum intended. Thus a bond for *threty* pounds, was held to be good for *thirty* pounds.

Butler v. Wigge, 1 Saund. 66. § 6. Any words by which the intention of the parties can be diſcovered, are ſufficient to make a condition of a bond: for if the words, though improper, ſhould be conſtrued void, and not a condition, then the obligation would be ſingle, and of force againſt the obligor, although he had performed the condition of it according to the intention of the parties; and the

the condition being for the benefit of the obligor, ſhall be conſtrued favourably.

§ 7. Mr. Serjeant *Williams*, in his notes on this caſe, ſays—" With reſpect to impoſſible or void conditions, " the following diſtinction has been taken; that where " the condition is underwritten or indorſed, that is " only void, and the obligation is ſingle; but where " the condition is part of the lien itſelf, and incor- " porated therewith, (as in a recognizance by bail) " if the condition be impoſſible, the obligation is " void." Pullerton v. Agnus, 1 Salk. 172

§ 8. If there be an omiſſion of the uſual concluſion of a condition, namely, that then the obligation ſhall be void, *&c.* yet the condition is good, and it is a good defeazance of the bond, for inſenſible and repugnant words ſhall be rejected. Idem.

§ 9. Where the condition of a bond is entire, and the whole is againſt law, it is void. But where the condition conſiſts of ſeveral different parts, and ſome of them are lawful, and the others not, it is good for ſo much as is lawful, and void for the reſt. But if a bond is given, with condition to do a thing againſt an act of parliament, and alſo to pay a juſt debt, the whole bond is void, becauſe the letter of the ſtatute makes it void, and it is a ſtrict law. Idem Hob. 14

§ 10. This ſecurity is called a ſpecialty, the debt being therein particularly ſpecified, in writing; and the party's ſeal, acknowledging the debt or duty, and

confirming the contract, renders it a security of a higher nature than those entered into without the solemnity of a seal. And therefore bond debts are preferred to those due upon simple contract.

Effect of a Bond as to the Obligor.

§ 11. When the condition of a bond is not performed, it becomes forfeited, or absolute at law; and is a charge on the personal estate and chattels real of the obligor, but not on his freehold lands; and therefore any settlement or disposition which he makes in his lifetime, of his lands, whether voluntary or not, will be good against bond creditors. For a bond being no lien whatever, on lands in the hands of the obligor, much less can it be so, when they are given away to a stranger.

Parslow v. Weedon, 1 Ab. Eq. 149.

As to his Heir, Tit. 1. f. 63.

§ 12. But if the obligor binds himself and his heirs in a bond, it will then be a lien on his heir, who in default of personal assets, will be bound to discharge it out of the real assets of the obligor, provided real assets descend to the heir; so that a bond is a collateral, though not a direct charge on lands.

Tit. 17. f. 17, to f. 20.

§ 13. It has been stated in a former title, that reversions after estates for years are immediate assets, and reversions after estates for life are *quasi assets*, in both of which cases they are liable to the payment of bond debts.

Tit. 17. f. 23. 29.

§ 14. It has also been stated, that reversions expectant on estates tail, are assets when they fall into possession; and in such case they are liable to the bond debts

debts of the perſon who was the original donor of the reverſion, and to whom the perſon claiming ſuch reverſion muſt make himſelf heir, but not to the bond debts of any of the intermediate heirs, who were entitled to ſuch reverſion.

Statute of Fraudulent Deviſes.

§ 15. By the ſtatute 3 *Will.* and *Mary*, c. 14. ſ. 2, and 3, all deviſes of lands are declared to be fraudulent and void, as againſt bond creditors, who may ſue the heirs of the obligor, and alſo his deviſees jointly. And, it has been determined by Lord *Hardwicke*, that an eſtate in reverſion is within this ſtatute. And that a deviſe of the reverſion by the heir of the obligor, is alſo within the act, and in ſuch a caſe the lands deviſed are liable.

Vide Kinaſton v. Clarke, Tit. 17. ſ. 26. Tit. 38. c. 1.

§ 16. By the fifth ſection of this ſtatute, it is enacted, that where the heir aliens the eſtate before any action brought, he ſhall be anſwerable for the bond debts of his anceſtor. But if the heir aliens the land, the obligee of the bond by which the heir is bound, can have his remedy only againſt the perſon of the heir, to the amount of the value of the land: but he cannot follow the land, when it is in the poſſeſſion of a *bona fide* purchaſer.

Vide Tit. 1. ſ. 64.

Bull. N. P. 175.

Where the Remedy may exceed the Penalty.

§ 17. Where a bond was forfeited, the penalty, which is uſually double the ſum advanced, became the legal debt; and there was no relief againſt ſuch penalty, but by application to a court of equity, where the obligee was only allowed to recover his principal, intereſt, and coſts.

§ 18. Although

2 Term Rep. 388.

§ 18. Although at law there can, in general, be no remedy beyond the penalty, becauſe in that the obligee ſeems to have taken up his ſecurity; yet as it is on the foundation of doing equal juſtice to both parties that equity proceeds, it will on any application for a favour from the obligor, compel him to pay the principal, intereſt, and coſts, though exceeding the penalty.

Vide 3 Bro. R. 492. 525.

Aſſignable.

§ 19. It has been ſtated, that choſes in action are aſſignable in equity, ſo that bonds are aſſignable. But the aſſignee takes them ſubject to the ſame equity to which they were liable in the hands of the original obligees.

1 Ab. Eq. 44.

2 Vern. 428.

Of a Recognizance.

§ 20. A recognizance is an obligation of record, which a perſon enters into before ſome magiſtrate, duly authorized, or in a court of record, to do ſome particular act, as to appear at the next aſſiſes, to keep the peace, to pay a ſum of money, or the like. It is in moſt reſpects ſimilar to a bond, the difference being chiefly, that a bond is the creation of a new debt, or obligation: whereas a recognizance is the acknowledgment upon record of a former debt.

§ 21. The form of a recognizance is thus, "That "*A. B.* doth acknowledge to owe to our ſovereign lord "the king, or to *C. D.* the ſum of 100 *l.* with condition "to be void on performance of the thing ſtipulated." This being either certified to, or taken by the officer of ſome court, it is witneſſed only by the officer of that court, and not by the party's ſeal, ſo that it is not,

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in ſtrict propriety, a deed, though the effects of it are greater than thoſe of a common bond, being allowed a priority in point of payment.

§ 22. A recognizance is a lien upon all the lands which the cognizor has at the time he acknowledges it, and alſo upon all thoſe which he afterwards acquires; ſo that no alienation by the cognizor will prevent the cognizee from extending the land.

§ 23. Where a reverſion expectant on an eſtate tail falls into poſſeſſion, it then becomes liable to the recognizances, not only of the original donor, but alſo of all the intermediate heirs who were entitled to ſuch reverſion, becauſe it is a direct lien on lands, and differs in that reſpect from a bond. Vide Tit. 15 f. 31, 32.

§ 24. By the ſtatute 29 *Cha.* 2. c. 3. it is enacted, that no recognizance ſhall bind lands in the hands of *bona fide purchaſers*, but from the time of the inrollment. 8 Geo. 1. c. 25.

§ 25. There are two other kinds of recognizances, of a private ſort, which are ſaid to be in the nature of a ſtatute merchant and ſtatute ſtaple, which have been already explained. Vide Tit. 14.

TITLE XXXII.

DEED.

CHAP. XI.

Of a Bargain and Sale.

§ 1. *Conveyances derived from the Statute of Uſes.*
3. *Of a Bargain and Sale.*
4. *What Words neceſſary.*
9. *Who may convey by Bargain and Sale.*
§ 15. *What may be conveyed by.*
22. *What Conſideration neceſſary.*
26. *Muſt be inrolled.*
34. *Exception—Lands in Cities and Boroughs.*
37. *Relation of the Inrolment.*

Section 1.

Conveyances derived from the Statute of Uſes.

HAVING treated of the ſeveral kinds of deeds which derive their effect from the common law, we now come to explain the nature and effect of thoſe deeds which derive their effect from the ſtatute of uſes.

Tit. 11. ch. 4. ſ. 10.

§ 2. It has been ſtated in a former title, that the ſtatute of uſes has given riſe to ſeveral new ſorts of conveyances which operate contrary to the rules of the common law. The firſt of theſe, which operates without any tranſmutation of poſſeſſion, is a bargain and ſale to uſes, which was well known, and often

8 Rep. 94 a.

uſed before the ſtatute of uſes; it being a common practice in thoſe times, for a perſon who was ſeiſed of lands, to bargain and ſell them to another; in which caſe, if the conſideration was ſufficient to raiſe a uſe, the

the bargainor became immediately ſeiſed to the uſe of the bargainee: all which might have been tranſacted without the formality of a deed.

Of a Bargain and Sale. 2 Inſt. 671.

§ 3. A bargain and ſale to uſes, is a contract by which a perſon conveys his lands to another for a pecuniary conſideration; in conſequence of which, a uſe ariſes to the bargainee, and the ſtatute 27 *Hen.* 8. immediately transfers the legal eſtate and poſſeſſion to the bargainee, without any entry or other act on his part.

What Words neceſſary. 2 Inſt. 671.

§ 4. The proper and technical words of this conveyance are, bargain and ſell; but any other words that would have been ſufficient to raiſe a uſe, upon a valuable conſideration, before the ſtatute, are now ſufficient to conſtitute a good bargain and ſale, but proper words of limitation muſt be inſerted.

8 Rep. 94 a.

§ 5. Thus, if a man, for money, aliens and grants lands to one and his heirs, or in tail, or for life, by deed indented and inrolled, it will amount to a bargain and ſale, and the land will paſs without any livery of ſeiſin.

Idem.

§ 6. So, where a man covenants, in conſideration of money, to ſtand ſeiſed to the uſe of his ſon in fee; if the deed be inrolled, it is a good bargain and ſale, though the words, bargain and ſell, be not uſed.

Fox's Case, 8 Rep. 93.

§ 7. *Edward Fox* demiſed lands to *G. Smalman* and others, for three lives, reſerving rent, and afterwards;

by indenture, in conſideration of 50 *l.* paid him by *Thomas Powys*, he demiſed, granted, ſet, and to farm let to the ſaid *Thomas Powys*, the ſaid tenements, to hold to the ſaid *Powys* for the term of 99 years, reſerving rent, and the firſt leſſee did not attorn. The queſtion was, whether the demiſe to *Powys* ſhould amount to a bargain and ſale, ſo that the reverſion with the rent ſhould paſs to *Powys* by the ſtatute of uſes without any attornment. And it was adjudged, that this demiſe and grant, in conſideration of 50 *l.*, amounted to a bargain and ſale for 99 years, there being no neceſſity for the preciſe words bargain and ſell. And it was ſaid, that as uſes ariſe from the intention of the parties, if by any clauſe in a deed it appears that it was the intent of the parties to paſs it in poſſeſſion by the common law, there no uſe ſhall be raiſed; and, therefore, if any letter of attorney be in the deed or covenant, to make livery of the lands according to the form and effect of the deed, or other ſuch like, it ſhall not paſs by way of uſe.

Anon. 3 Leon. 16.

§ 8. Where a deed contained a power of attorney to make livery of ſeiſin, but was inrolled as a bargain and ſale, within a month after its execution, though livery of ſeiſin was given four months after, yet it was held to operate as a bargain and ſale, and not as a ſoffment.

Who may convey by Bargain and Sale.

§ 9. With reſpect to the perſons who are capable of conveying their eſtates by bargain and ſale, as this conveyance only transfers a uſe, none but thoſe who are capable of being ſeiſed to a uſe can bargain and ſell:

ſell: for there muſt be a perſon ſeiſed to a uſe, and a uſe *in eſſe*, before the ſtatute can have any operation. Tit. 11. ch. 3.

§ 10. It follows, that neither the king, the queen, nor a corporation aggregate, can convey their lands by bargain and ſale: but, as all private perſons may be ſeiſed to a uſe, they may convey their eſtates by bargain and ſale. Atkins v. Longvill, Cro. Ja. 50.

§ 11. *Jenkins* ſays, that a bargain and ſale by the king for any conſideration, to a corporation, is good, although the king cannot ſtand ſeiſed to the uſe of another; and the conſideration of money paid, or mentioned to be paid, although by any ſtranger, will make the bargain and ſale valid. Cent. 6. ca. 88.

§ 12. Lord Chief Baron *Comyns* has ſaid, that a corporation may bargain and ſell, for they may give a uſe, though they cannot be ſeiſed to a uſe. This poſition is founded on the authority of the following caſe. Dig. Tit. Barg. & Sale, (B. 3.)

§ 13. The Prioreſs of *Hallywell* being ſeiſed of *Priors*, granted the ſame by the words *dedi et conceſſi pro certa pecuniæ ſumma*, to Lord *Audley* the chancellor of *England*, and his heirs. It was objected, that a bargain and ſale by a corporation was not good, for a corporation could not be ſeiſed to another's uſe; and the nature of ſuch a conveyance was, to take effect by way of uſe, in the bargainee, and, afterwards, the ſtatute drew the poſſeſſion to the uſe. But the court utterly Holland and Bonis's Caſe, 3 Leon. 175.

utterly rejected the ſaid exception, as dangerous, for that ſuch were the conveyances of the greater part of the poſſeſſions of monaſteries. And it was ſaid by Serjeant *Shuttleworth*, that although ſuch a corporation could not take an eſtate to another's uſe, yet they might charge their own poſſeſſions with a uſe to another.

§ 14. This caſe appears to be of doubtful authority, for the only principle upon which it can be ſupported, namely, that lands may be charged with a uſe, was utterly rejected in *Chudleigh's* caſe; in which, it was held, that a uſe being a confidence and truſt, it would be an abſurdity to ſay that it was annexed to the land, or charged on the land, like a rent or common.

1 Rep. 127 *a.*

What may be conveyed by.

§ 15. Every eſtate of freehold or inheritance in poſſeſſion in land, may be conveyed by bargain and ſale. But it was formerly held, that there muſt be an actual ſeiſin in the bargainor, at the time when the bargain and ſale was made, for, without a ſeiſin, no uſe could ariſe.

§ 16. An actual ſeiſin in the bargainor, in order to enable him to convey by bargain and ſale, does not, however, ſeem to be required in many caſes. Thus, it was held in *Fox's* caſe, that a reverſion expectant on a freehold eſtate might be conveyed by bargain and ſale. And it appears to be now admitted, that eſtates in remainder and reverſion may be conveyed by bargain and ſale, provided the right to them be actually veſted in the bargainor at the time of the execution of

Ante f. 7.

Idem.

of the bargain and ſale. And Lord *Hardwicke* is reported to have ſaid, that an equity of redemption may be conveyed by bargain and ſale. 2 Atk. 15.

§ 17. A truſt eſtate is now frequently conveyed by bargain and ſale, and Lord *Thurlow* is reported to have ſaid, that, in many acts of parliament, an equitable eſtate is conſidered the ſame as if it were a legal eſtate; that the word ſeiſed, in law or equity, in the qualification act, ſhew that the word ſeiſed is applicable to both, and that the word ſeiſin extends to being ſeiſed of an eſtate in equity. Shrapnel v. Vernon, 2 Bro. R. 271.

§ 18. A rent *in eſſe* may be conveyed by bargain and ſale, as alſo an advowſon, tithes, or any other incorporeal hereditament, becauſe they are expreſsly mentioned in the ſtatute of uſes. Taylor v. Vale, Cro. Eliz. 166.

§ 19. Incorporeal hereditaments muſt, however, be in actual exiſtence at the time, otherwiſe they will not ariſe from the bargain and ſale.

§ 20. A perſon bargained and ſold certain lands to *J. S.* in fee, together with a way over other lands. It was held that no right of way paſſed, becauſe there was no grant of it in the indenture, but only a bargain and ſale of land, and of a way over other land, which could not be good, for nothing but a uſe paſſed by the deed, and there could not be a uſe of a thing that was not *in eſſe* at the time, as a way common, *&c.* that was newly created; for, until ſuch things were created, no uſe could be raiſed of them by bargain and ſale. Beaudely v. Brook, Cro. Ja. 189.

§ 21. No chattel intereſt in lands can be conveyed by bargain and ſale, becauſe the poſſeſſor of a chattel intereſt has no ſeiſin out of which a uſe can ariſe. It ſhould, however, be obſerved, that where a perſon is ſeiſed of the freehold of lands, he may by bargain and ſale create a chattel intereſt out of ſuch lands, for, having a ſeiſin in himſelf, he is enabled to raiſe a uſe for years, as well as for any greater eſtate; and, by the very words of the ſtatute of uſes, the poſſeſſion is as fully transferred to a *ceſtui que uſe* for years, as to a *ceſtui que uſe* of a freehold intereſt: nor will an entry be neceſſary in ſuch a caſe to veſt the legal eſtate.

Fox's Caſe, Ante f.

What Conſideration neceſſary.

§ 22. A bargain and ſale is merely a conveyance of a uſe; and as a uſe cannot be raiſed without a conſideration, it follows, that no bargain and ſale can be good without a conſideration, which muſt alſo be a pecuniary one, for the very name of the conveyance imports a *quid pro quo*. But it is not abſolutely neceſſary that the conſideration ſhould be mentioned in the deed, as an averment of a conſideration which is conſiſtent with the deed is admiſſible in evidence.

1 Rep. 176 a.

Willes R. 677.

Ward v. Lambert, Cro. Eliz. 394.

§ 23. A perſon by indenture, reciting, that whereas *J. S.* was bound in a recognizance and other bond for him, for divers good cauſes and conſiderations, bargained and ſold lands to him and his heirs. It was proved that there was no money paid, and, therefore, the conveyance was held void as a bargain and ſale.

Croſſing v. Scudamore, 1 Vent. 137.

§ 24. A perſon, in conſideration of natural love, and for augmentation of the portion, and preferment

in marriage of his daughter, bargained and ſold lands to her. It was determined that the deed could not operate as a bargain and ſale, becauſe no pecuniary conſideration was given.

§ 25. At common law, no rent could be reſerved on a bargain and ſale, becauſe nothing but a uſe paſſed, which was not ſuch an eſtate as the bargainor could have recourſe to for a diſtreſs: but, after the ſtatute of uſes, it was reſolved, that a rent might be reſerved on a bargain and ſale; and that the reſervation of ſuch rent, would be conſidered as a ſufficient conſideration to raiſe a uſe to the bargainee. 1 Inſt. 144 *a*. Wykes v. Tyllerd, Cro. Eliz. 595.

§ 26. When the ſtatute of uſes was made, it was immediately foreſeen, that all lands would thenceforth be conveyed by bargain and ſale, being a conveyance of a private nature. To prevent this, the Legiſlature, in the ſame ſeſſions, paſſed an act, 27 *Hen.* 8. c. 16. by which it was enacted, that no manors, lands, tenements, or other hereditaments, ſhould paſs from one to another, whereby any eſtate of inheritance or freehold ſhould be made by reaſon of any bargain and ſale thereof, except the ſame bargain and ſale be made by writing indented, ſealed, and inrolled in one of the king's courts of record at *Weſtminſter*, or within the county where the lands lie, before the *cuſtos rotulorum* and two juſtices of the peace, and the clerk of the peace of the ſame county, or two of them at the leaſt, whereof the clerk of the peace to be one. Muſt be inrolled. 2 Inſt. 671. Gilb. Uſes 90.

§ 27. This ſtatute requires that all bargains and ſales ſhall be by deed indented, and the time preſcribed

2 Inſt. 674. 5 Rep. 1 *b.* Dyer 218 *b.* Hob. 140.

for inrolment is ſix lunar months, to be computed from the date of the deed, which is excluſive; and if the deed has no date, then the time muſt be computed from the delivery.

§ 28. By the ſtatute 5 *Eliz.* c. 26. bargains and ſales affecting lands, tenements, or hereditaments, in the counties palatine of *Lancaſter*, *Cheſter*, and the biſhopric of *Durham*, are directed to be inrolled in the reſpective courts of thoſe counties.

§ 29. By the ſtatute 5 *Ann*, c. 18. it is enacted, that all bargains and ſales of any manors, lands, tenements, and hereditaments lying within the weſt riding of the county of *York*, which ſhall be inrolled before the regiſter at the public office at *Wakefield*, ſhall be as good as if inrolled at *Weſtminſter*.

§ 30. By the ſtatute 6 *Ann*, c. 35. ſ. 16. it is enacted, that all bargains and ſales of lands, tenements, and hereditaments lying in the eaſt riding of the county of *York*, or in the town of *Kingſton-upon-Hull*, which ſhall be inrolled at *Beverly*, ſhall be as good as if inrolled at *Weſtminſter*.

§ 31. There is a clauſe in this act, ſ. 30. that in all deeds of bargain and ſale inrolled in purſuance thereof, whereby any eſtate of inheritance in fee-ſimple is limited to the bargainee and his heirs, the words grant, bargain, and ſell, ſhall be expreſs covenants to the bargainee, his heirs and aſſigns, from the bargainor, that the bargainor, notwithſtanding any act done by

him, was, at the time of the execution of ſuch deed, ſeiſed of the hereditaments and premiſes thereby granted, bargained, and ſold, of an indefeaſible eſtate in fee-ſimple free from all incumbrances, (rents and ſervices due to the lord of the fee only excepted), and for quiet enjoyment thereof againſt the bargainor, his heirs and aſſigns, and all claiming under him, and alſo for further aſſurance thereof to be made by the bargainor, his heirs and aſſigns, and all claiming under him, unleſs the ſame ſhall be reſtrained and limited by expreſs particular words contained in ſuch deed; and that the bargainee, his heirs, executors, adminiſtrators, and aſſigns reſpectively, ſhall and may in any action to be brought, aſſign a breach or breaches thereupon, as they might do in caſe ſuch covenants were expreſsly inſerted in ſuch bargain and ſale.

§ 32. By the ſtatute 8 *Geo.* 2. c. 6. ſ. 21. it is enacted, that bargains and ſales of lands lying within the north riding of the county of *York*, ſhall be inrolled by the regiſter of that riding, and ſhall be as effectual as if inrolled at *Weſtminſter*. And a clauſe is inſerted in this act, ſ. 35. ſimilar to that which is ſtated in the preceding ſection.

§ 33. By the ſtatute 10 *Ann*, c. 18. ſ. 3. it is enacted, that a copy of the inrolment of a bargain and ſale, examined with the inrolment and ſigned by the proper officer, and proved upon oath to be a true copy, ſo examined and ſigned, ſhall in all caſes be of the ſame force and effect, as the indenture of bargain and ſale would be, if the ſame was produced.

Exception—Lands in Cities and Boroughs.

§ 34. There is a proviſo in the ſtatute of inrolments, 27 *Hen.* 8. that it ſhall not extend to lands, *&c.* lying within any city, borough, or town corporate, wherein the mayors, recorders, *&c.* have authority to inroll.

2 Inſt. 675.

§ 35. In conſequence of this proviſo, lands and tenements in cities, boroughs, *&c.* having the privilege of inrolment, are not within the act: for, although the intention of the ſtatute was only to exempt them from inrolments in the courts at *Weſtminſter*, yet the ſtatute is worded in ſuch a manner, that they are diſcharged from any inrollment at all.

2 Inſt. 671.

§ 36. The words of the ſtatute 27 *Hen.* 8. of inrolments, only extend to eſtates of inheritance or freehold, and, therefore, a bargain and ſale of lands for a term of years need not be inrolled.

Relation of the Inrolment. 2 Inſt. 674.

§ 37. In conſequence of the ſtatute of inrolments, the freehold does not paſs from the bargainor until the deed of bargain and ſale is duly inrolled; but, if it be inrolled within the ſix months, then the inrolment has ſuch a relation back to the date or time of delivery of the bargain and ſale, that the freehold is conſidered in law as having paſſed to all intents and purpoſes from the bargainor to the bargainee, immediately on the date or delivery of the bargain and ſale; and, therefore, all incumbrances and meſne conveyances made by the bargainor between the date or delivery, and the inrolment, are void againſt the bargainee.

§ 38. One

§ 38. One *Sewſter* being ſeiſed of certain lands in fee, by deed dated 7th *November*, bargained and ſold them for money. On the 9th of the ſame month, he acknowledged a recognizance to another perſon, and, on the 20th, the deed was inrolled: a *ſcire facias* was brought upon the recognizance, and the queſtion was, whether *Sewſter* was to be conſidered as having been ſeiſed of the lands on the 9th of *November*, the deed not having been inrolled until the 20th of the ſame month. It was adjudged, unanimouſly, that *Sewſter* was not ſeiſed in fee of the land on the 9th of *November*, for that, when the deed was inrolled, the bargainee was, in judgment of law, ſeiſed of the land from the date of the deed.

Mullery v. Jennings, 2 Inſt. 674. Owen 69.

§ 39. Neither the death of the bargainor or the bargainee before inrolment, will prevent the paſſing of the eſtate. And, where the bargainee dies before inrolment, his heir ſhall be in by deſcent.

2 Inſt. 674. Dymock's Caſe, Cro. Ja 408. Hob. 136.

§ 40. Though the inrolment has relation back for the advantage of the bargainee to avoid all meſne incumbrances and conveyances, yet, when the lands are alſo conveyed by fine or feoffment to the bargainee before inrolment, he ſhall take by the fine or feoffment. Therefore, if *A.* bargains and ſells to *B.*, and, before the bargain and ſale is inrolled, the bargainor levies a fine, ſuffers a recovery, or makes a feoffment of the lands to *B.*, he will be in by the feoffment, fine, or recovery, becauſe, when a conveyance by the common law, and one by the ſtatute, concur, that by the common law ſhall be preferred. But if, in a caſe

2 Inſt. 671. 4 Rep. 70 *b.* Flower v. Baldwin, Cro. Car. 217.

of this kind, the bargainor incumbers the land between the execution of the bargain and ſale, and the levying the fine, *&c.* then the inrolment ſhall have relation back for the avoiding ſuch meſne incumbrances in favour of the bargainee.

Le Neve v. Le Neve.

§ 41. It is ſaid by Lord *Hardwicke*, in a caſe which will be ſtated in the 21ſt Chapter of this Title, that if there be a prior bargainee, whoſe deed is not inrolled, and a ſecond, whoſe deed is properly inrolled, if this laſt had notice of the prior deed, the prior ſhall prevail in equity; and if he has any other conveyance as a feoffment, or a leaſe and releaſe, the firſt vendee ſhall likewiſe prevail at law.

§ 42. A bargain and ſale does not diveſt any eſtate, as will be ſhewn in the next Chapter.

TITLE

TITLE XXXII.

DEED.

CHAP. XII.

Of a Covenant to ſtand ſeiſed.

§ 1. *Nature of.*
2. *What Words neceſſary.*
7. *Who may covenant to ſtand ſeiſed.*
8. *What may be conveyed by.*
12. *What Conſideration neceſſary.*
25. *A Rent may be reſerved on a Covenant, &c.*
§ 27. *The Eſtate continues until a Uſe ariſes.*
28. *A Bargain and Sale, and Covenant to ſtand ſeiſed, do not diveſt any Eſtate.*
31. *No Uſes can be declared on theſe Conveyances.*

Section 1.

Nature of.

THE ſecond ſort of conveyance which derives its effect from the ſtatute of uſes, and operates without tranſmutation of poſſeſſion, is a covenant to ſtand ſeiſed to uſes.

Plowd. 301. 303.

Formerly, if a perſon had covenanted and agreed for himſelf and his heirs, that, for a certain conſideration, another ſhould have his lands, though the lands did not paſs for want of livery, yet the covenantee acquired the uſe. And, now, whenever a covenant of this kind is entered into, if the conſideration be ſufficient, a uſe ariſes out of the ſeiſin of the covenantor, which is immediately executed by the ſtatute in the *ceſtuique uſe*, who thereby acquires the legal eſtate and poſſeſſion.

§ 2. The

What Words neceſſary. 1 Vent. 137. 2 Vent. 150. Willes R. 676.

§ 2. The proper and technical words of this conveyance are, covenant to ſtand ſeiſed to the uſe of *A.*, *&c.* but any other words, ſuch as grant, bargain and ſell, or aſſign, will create a covenant to ſtand ſeiſed, if it appears to have been the intention of the party to uſe them for that purpoſe.

Croſſing v. Scudamore, 1 Mod. 175.

§ 3. *A.*, in conſideration of natural love, augmentation of portion and preferment of his daughter *E.* in marriage, and for other good and valuable conſiderations, did give, grant, bargain, ſell, alien, enfeoff, and confirm to *E.* and her heirs, *&c.* with a covenant for quiet enjoyment, and ſpecial warranty: all the court held, the land ſhould paſs by way of covenant to ſtand ſeiſed.

Walker v. Hal, 2 Lev. 213. Olman v. Sheafe, 3 Lev. 370.

Harriſon v. Auſtin, 3 Mod. 237.

§ 4. A ſettlement was made in the following words: "If I have no iſſue, and, in caſe I die without iſſue "of my body lawfully begotten, then I give, grant, "and confirm my land, *&c.* to my kinſwoman *Sarah* "*Stokes*, to have and to hold the ſame to the uſe of "myſelf for life, and, after my deceaſe, to the uſe of "the ſaid *Sarah*, and the heirs of her body to be "begotten, with remainders over." It was held, that this was a good covenant to ſtand ſeiſed.

Doe v. Simpſon, 2 Will. R. 22. Willes R. 673.

§ 5. *George Simpſon*, in conſideration of his marriage with *Ann Storey*, gave, granted, enfeoffed, aliened, and confirmed lands to *Ann* and *William Storey* and their aſſigns, *habendum* to the uſe of *Ann Storey* for life, remainder to the heirs of her body begotten by

Simpſon

Simpſon, who covenanted that the lands ſhould remain to the ſaid uſes.

The marriage took effect, and, ſoon after, *Simpſon* became a bankrupt. His aſſignees ſold the land, conſidering the deed as void in law, or, if not, that *Simpſon* was tenant in tail under it. It was reſolved, that the deed ſhould operate as a covenant to ſtand ſeiſed.

§ 6. *Thomas Kirkby* executed indentures of leaſe and releaſe to his brother. The leaſe was made for a year in the uſual manner. The releaſe witneſſed, that for the natural love which *Thomas Kirkby* bore to his brother, and, in conſideration of 100 *l.* paid to him by his brother, he granted, releaſed, and confirmed unto his brother, (in his actual poſſeſſion then being by virtue of the leaſe for a year), after the death of the ſaid *Thomas Kirkby*, all that cloſe, *&c.* to hold the ſame to his brother and the heirs of his body. It was admitted, that this releaſe was void as a common law aſſurance, becauſe it was a grant of a freehold to commence *in futuro*; but the court was unanimouſly of opinion, that it ſhould be conſidered as a covenant to ſtand ſeiſed.

Roe v. Tranmer, 2 Wilſ. R. 75. Willes R. 682.

Doe v. Salkeld, Willes R. 673.

§ 7. A covenant to ſtand ſeiſed being ſimilar, in many reſpects, to a bargain and ſale, it follows, that no perſon can transfer lands by this mode of conveyance, who cannot be ſeiſed to a uſe.

Who may covenant to ſtand ſeiſed.

§ 8. It alſo follows, from the ſame principle, that no ſpecies of property can be transferred by covenant

What may be conveyed by.

venant to ſtand ſeiſed, which cannot be conveyed to a uſe.

§ 9. A covenant to ſtand ſeiſed only paſſes lands whereof the covenantor is actually ſeiſed or entitled to in remainder at the time of the execution of the deed; becauſe the uſe muſt ariſe out of the ſeiſin which the covenantor has at the time.

Wiſeman's Caſe, 2 Rep. 15 *a*.

§ 10. A father covenanted, in conſideration of natural affection, to ſtand ſeiſed of all the lands which he had, or ſhould afterwards purchaſe, to the uſe of himſelf for life, remainder to his youngeſt ſon and his heirs. He afterwards purchaſed lands, and died. It was determined, that the after-purchaſed lands did not veſt in the younger ſon by this deed, becauſe a man cannot, by a covenant, raiſe a uſe out of land which he hath not.

Yelverton v. Yelverton, Cro. Eliz. 401. 2 Roll Ab. 790.

§ 11. If two perſons are joint-tenants in fee, and one of them covenants, that, after the death of his companion, he will ſtand ſeiſed of all the moiety of his companion to certain uſes, though the covenantor ſurvives, yet no uſe ſhall ariſe, becauſe, at the time of the covenant, he could not grant or charge his moiety.

Barton's Caſe, 2 Roll Ab. 790.

§ 12. A covenant to ſtand ſeiſed being a conveyance of a private nature, and valid without inrolment, it is abſolutely neceſſary that the conſideration be either affection to a near relation, or marriage.

What Conſideration neceſſary.

§ 13. If

§ 13. If a man, in consideration of the natural love which he bears to *B.* his brother, covenants to stand seised to the use of *B.* and *A.* his wife for their lives, this shall raise a good estate to *A.*, for the covenantor gives the estate to *A.* in consideration of the marriage between her and his brother. Sharrington v. Strotton, Plowd. 300.

§ 14. A man covenanted, in consideration of natural love and affection to his son, to stand seised to the use of his son for life, remainder to the use of such wife as the son should marry, for life, *&c.* and it was held, that a use arose to the wife, she being within the consideration; for it was for the advancement of his posterity, and, without a wife, the son could not have posterity. Bould v. Winston, 2 Roll Ab. 786.

§ 15. A use will arise to a wife, without any consideration expressed, upon a covenant to stand seised.

§ 16. *Robert Bedell*, by indenture between him and his wife of the first part, *James* his second son of the second part, and *Michael* his third son, of the third part, in consideration of natural love and affection for his sons, covenanted to stand seised to the use of himself for life, remainder to his wife for life, remainder as to one moiety, to one of his sons, and, as to the other moiety, to the other son. The question was, whether any use arose to the wife or not. It was objected, that the wife was not within the considerations expressed in the indenture; and no other considerations could be averred than were contained in the deed. But it was answered and resolved, that a consideration Bedell's Case, 7 Rep. 40.

ſideration which ſtood with the deed, and was not repugnant to it, might well be averred. And when he limited the lands to the uſe of his wife for life, that imported a ſufficient conſideration in itſelf, and there needed no averment, for *manifeſta probatione non indigent.*

Goodtitle v. Petto, 2 Stra. R. 934.

§ 17. Love and affection to an illegitimate child is not a ſufficient conſideration to raiſe a uſe in a covenant to ſtand ſeiſed.

§ 18. A perſon covenanted, in conſideration of natural love and affection, to ſtand ſeiſed to the uſe of himſelf for life, remainder to *A.* his reputed ſon, (who was his baſtard), for life, *&c.*; and alſo, covenanted to levy a fine, or make a feoffment for farther aſſurance: afterwards, he made a feoffment in fee to the covenantees, in performance of his covenant, to the ſame uſes. It was reſolved, that no uſe aroſe to *A.* the baſtard by the covenant, for want of a conſideration; nor could he take any thing by the feoffment, it being only made for further aſſurance.

Perrot's Caſe, 2 Roll Ab. 785. Dyer 374. pl. 16.

§ 19. The adopting a ſirname is not a ſufficient conſideration to raiſe a uſe in a covenant to ſtand ſeiſed, as was reſolved in Sir *Chriſtopher Hatton's* caſe, who having a ſiſter's ſon named *Newport*, covenanted, in conſideration of his taking the name of *Hatton*, he would ſtand ſeiſed to his uſe. But it was reſolved, that no uſe aroſe, for want of a ſufficient conſideration.

Jenk. Cent. 2 Ca. 60.

§ 20. It

§ 20. It is ſaid, in *Roll's Abridgement*, that the conſideration of ancient acquaintance, or of being chamber-fellows, or entire friends, ſhall not raiſe a uſe. For the obligation that a man has to his own family, is ſuppoſed, by all governments, to be ſuperior to obligations of mere gratitude; and, therefore, the Chancery will not preſume that it is the party's intent to diſpoſe of lands out of the family, where any ceremony is abſent that is neceſſary in law to the making ſuch a contract. Tit. Uſe, Vol 2. 783. Plow. 503. Gilb. Uſes 48.

§ 21. In the caſe of a covenant to ſtand ſeiſed, a uſe will ariſe to thoſe who are within the conſideration, though no uſe will ariſe to thoſe who are ſtrangers to it. Paget's Caſe, 1 Rep. 154 *a*.

§ 22. Tenant in tail, remainder in fee, the perſon in remainder, to the intent that his lands ſhould continue and remain in his family, name, and blood, covenanted to ſtand ſeiſed to the uſe of himſelf and the heirs male of his body, remainder to the uſe of his brothers in tail, remainder to the uſe of the queen, her heirs and ſucceſſors. It was reſolved, that a uſe aroſe to the covenantor in tail, and to his brothers; but that no uſe aroſe to the queen, for want of a conſideration. Wiſeman's Caſe, 2 Rep. 15 *a*.

§ 23. *Paul Riſley*, by indenture between him and Sir *Thomas Denton*, Sir *A. Denton*, *Thomas Riſley* his brother, and *W. Withers*, covenanted and agreed with them to ſtand ſeiſed of certain tenements, to the uſe of himſelf for life, remainder to the uſe of his wife for life, Smith v. Riſley, Cro. Car. 529.

life, remainder to the uſe of the covenantees and their heirs upon ſeveral truſts for his children. It was reſolved, that the uſes were well raiſed, and veſted in *Thomas* his brother, he being of the blood of the covenantor, but that no uſe aroſe to the other covenantees, they being ſtrangers.

Whaley v. Tancard, 2 Lev. 52. 54.

§ 24. *A.* covenanted to ſtand ſeiſed to ſeveral uſes, and afterwards to *C.* for 99 years, if he ſhould ſo long live, remainder to two ſtrangers for the life of *C.* to preſerve contingent remainders, remainder over. It was agreed by all, that the remainder to the two ſtrangers was void, they not being of the blood of the covenantor, ſo that they could not enter for a forfeiture.

A Rent may be reſerved on a Covenant, &c.

§ 25. In conſequence of the 4th and 5th ſections of the *Statute of Uſes*, a rent may be reſerved on a covenant to ſtand ſeiſed.

Rivetts v. Godſon, W. Jones 179.

§ 26. Thus, where *A.*, in conſideration of natural love and affection, covenanted to ſtand ſeiſed to the uſe of himſelf for life, remainder to *B.* his ſon in tail, and to the intent that *B.* ſhould have a rent iſſuing out of the lands during the life of *A.* It was reſolved, that upon the words of the 4th and 5th ſections of the *Statute of Uſes*, *B.* was entitled to this rent.

The Eſtate continues until a Uſe ariſes. 1 Rep. 154 *a.*

§ 27. In the caſe of a covenant to ſtand, the eſtate continues in the covenantor until a lawful uſe ariſes. Thus, it is ſaid by *Manwood*, Chief Baron, that if a man makes a feoffment in fee, to the uſe of *A.* for life,

life, remainder to the uſe of *B.* for life, remainder to the uſe of *C.* in fee, if *A.* refuſes, *B.* ſhall take his eſtate preſently, for the feoffor, by his feoffment, hath given all his eſtate out of him, and all the uſes are created out of it, as out of one and the ſame root; and, therefore, as long as any of the uſes can take effect, the feoffor ſhall not have the land. But, in the caſe of a covenant which raiſeth an uſe, there the conſideration, which is the cauſe that raiſes every ſeveral uſe, is ſeveral; and all the uſes grow and riſe out of the eſtate of the covenantor; and, therefore, there, if one refuſes, he who is next in remainder, ſhall not take the land preſently, but the covenantor ſhall keep it.

A Bargain and Sale, and Covenant to ſtand ſeiſed, do not diveſt any Eſtate. Gilb. Uſes 140. Tit. 11. ch. 3. ſ. 22, 23, 24.

§ 28. A bargain and ſale, and covenant to ſtand ſeiſed, paſs no intereſt but that which the bargainor or covenantor can lawfully transfer, for, as nothing but a uſe paſſes by thoſe conveyances, and as no uſe can poſſibly be greater than the eſtate out of which it is created, it follows, that where a uſe is granted which is greater than the legal eſtate out of which ſuch uſe is to iſſue, it is merely void, and the ſtatute executes the poſſeſſion to ſo much only of the uſe, as is lawfully granted.

Tit. 16. ch. 6. ſ. 8.

§ 29. Thus, if a tenant for life, with contingent remainders depending on his eſtate, conveys away his eſtate for life to a ſtranger in fee by bargain and ſale, or covenants to ſtand ſeiſed thereof to the uſe of his ſon in fee, the bargainee or covenantee will only take

an eſtate for life, and the contingent remainders will not be deſtroyed.

Seymour's Caſe, 10 Rep. 95. 1 Atk. 2.

§ 30. In the ſame manner, if a tenant in tail bargains and ſells his eſtate, or covenants to ſtand ſeiſed of it in fee, the bargainee or covenantee will only acquire a baſe fee, that is, an eſtate to him and his heirs, determinable on the death of the tenant in tail; and the iſſue in tail will not be put to his formedon on the death of his anceſtor, but may enter on the lands, and bring an ejectment, becauſe theſe conveyances do not create a diſcontinuance.

No Uſes can be declared on theſe Conveyances.

§ 31. No uſes can be declared on a bargain and ſale, or covenant to ſtand ſeiſed, but to the bargainee or covenantee; becauſe theſe conveyances only paſs a uſe, and the legal eſtate and poſſeſſion is transferred by the ſtatute. Now, it has been ſhewn, that the ſtatute only executes the firſt uſe, and not the ſecond; ſo that the ſecond uſe is void in law, but is ſupported in equity under the name of a truſt.

Tit. 12. ch. 1. § 5. 11.

TITLE

TITLE XXXII.

D E E D.

CHAP. XIII.

Of a Leaſe and Releaſe.

§ 1. *Origin and Nature of.*
8. *Who may convey by, and what.*
9. *Eſtates in Remainder and Reverſion.*
12. *What Conſideration neceſſary.*
16. *A Leaſe and Releaſe does not deveſt any Eſtate.*
17. *Whether a Uſe reſults on a Leaſe and Releaſe.*
19. *To whom the Title Deeds belong.*

Section 1.

Origin and Nature of.

THERE is a third ſort of conveyance uſually claſſed under thoſe which derive their effect from the ſtatute of uſes, but of which only one part is derived from that ſtatute, and the other part from the principles of the common law. It is called a leaſe and releaſe, but it is in fact a bargain and ſale for a year, and a common law releaſe, operating by way of enlargement; and owes its riſe to the following circumſtances.

§ 2. The framers of the ſtatute of uſes foreſaw, that freehold eſtates would thenceforth become tranſferable by parol only, without any form or ceremony whatever. A clauſe was therefore inſerted in that ſtatute, by which all bargains and ſales, of freehold eſtates, were required to be made by writing, indented

and inrolled. This proviſion, which, if it had not been evaded, would have introduced an almoſt univerſal regiſter of conveyances of the freehold, in the caſe of corporeal hereditaments, was ſoon defeated by the omiſſion to extend the ſtatute to bargains and ſales for terms of years.

3 Reeves Hiſt. 357.

§ 3. In the times of *Hen.* 6. and *Edw.* 4. it was not unuſual to transfer freehold eſtates in the following manner. A deed of leaſe was made to the party intended to be the purchaſer, for three or four years, and after the leſſee had entered into poſſeſſion, a deed of releaſe of the inheritance was executed to him, which operated to enlarge his eſtate, from a term for years, to a fee ſimple, and thus he became ſeiſed in fee, as completely as he could have been by fine or feoffment with livery.

§ 4. When it was obſerved that the ſtatute of uſes transfered the actual poſſeſſion without entry, the idea of a leaſe and releaſe was adopted. A bargain and ſale for a year was made by the tenant of the freehold, to the perſon to whom the lands were intended to be releaſed. This bargain and ſale, in conſequence of the conſideration, makes the bargainor ſtand ſeiſed to uſe of the bargainee, without any inrolment; by which means the uſe of the term for a year is veſted in the bargainee, and then the ſtatute transfers the poſſeſſion, ſo that the bargainee becomes immediately capable of accepting a releaſe of the freehold and reverſion; and accordingly a releaſe is made to him, dated the day next after the day of the date of the bargain

4 Reeves 355.

bargain and ſale: This is held to ſupply the place of livery of ſeiſin, and ſo a conveyance by leaſe and releaſe, is conſidered as equal to a feoffment with livery of ſeiſin*.

§ 5. The validity of this conveyance was formerly much doubted, and Mr. *Noy* was of opinion, that it could not be ſupported without an actual entry, by the bargainee on the lands. But it was determined in the Court of Wards, 18 *Jac.* 1., by the two Chief Juſtices, *Montague* and *Hobart*, and *Tanfield* Chief Baron, "That upon a deed of bargain and ſale for "years, of lands, whereof he himſelf is in poſſeſſion, "and the bargainee never entered, if afterwards the "bargainors make a grant of the reverſion (reciting "this leaſe) expectant upon it, to divers uſes, that it "is a good conveyance of the reverſion, and the "eſtate was executed and veſted in the leſſee for "years, by the ſtatute, and was divided from the "reverſion; and not like to a leaſe for years, at the "common law: for in that caſe there is not any ap-"parent leſſee till he enters; but here by operation "of the ſtatute, it abſolutely and actually veſts the "eſtate in him as the uſe, but not to have treſpaſs "without entry, and actual poſſeſſion, wherefore

2 Mod. 252.

Lutwich v. Mitton, Cro. Ja. 604. Cro. Car. 110.

* *Fabian Phillips* ſays, that this conveyance was, "at firſt only "purpoſely contrived by Serjeant *Francis Moore*, at the requeſt of "the Lord *Norris*, to the end that ſome of his kindred or near "relations ſhould not take notice, by any ſearch of public records, "what conveyance or ſettlement he ſhould make of his Eſtate." Treat. on the Writ of *Capias*.

" they would not permit this point to be further argued.

Barker v. Keate, 2 Mod. 249. 253.

§ 6. In a ſubſequent caſe, determined in 29 *Car.* 2. where there was a bargain and ſale for years, followed by a releaſe; judgment was given by the whole court, " That the leaſe being within the ſtatute of uſes, " there was no need of an actual entry, to make the " leſſee capable of the releaſe, for by virtue of the " ſtatute he ſhall be adjudged to be in actual poſ- " ſeſſion."

6 Mod. 44. 2 Lev. 108.

§ 7. The recital of a leaſe for a year, in a deed of releaſe, is good evidence of ſuch leaſe againſt the releaſor, and all thoſe who claim under him, but not as to others, without proving that there was ſuch a deed, and that it was loſt or deſtroyed.

Who may convey by, and what.

§ 8. Every perſon who is capable of being ſeiſed to the uſe of another, may convey his eſtate by leaſe and releaſe; and every ſpecies of property, that is capable of being conveyed to uſes, may be conveyed by leaſe and releaſe.

Eſtates in Remainder or Reverſion.

Caſes and Opinions, vol. 2. p. 144.

1 Inſt. 270 *a* *n.* 3.

§ 9. An eſtate in remainder or reverſion, expectant on an eſtate for years, may be conveyed by leaſe and releaſe. This point is fully proved by that eminent conveyancer, the late Mr. *Booth*, in an opinion which has been printed. He admits Lord *Coke*'s poſition, that a releaſe cannot work without a poſſeſſion; but contends, he only means, that the eſtate upon which the releaſe is to work muſt be a veſted eſtate: for in the ſame

folio, Lord *Coke* ſays—" If a man make a leaſe for " years, remainder for years, and the firſt leſſee en- " ters, a releaſe to him in the remainder for years, is " good, to enlarge his eſtate;" which ſhows his opinion to be, that it is not neceſſary that the eſtate to be enlarged, ſhould be an eſtate in actual poſſeſſion, and that it ſuffices, if it be a veſted eſtate, divided from the ultimate reverſion.

§ 10. In the caſe of *Shortridge* v. *Lampleigh*, which will be ſtated in a ſubſequent part of this chapter, the perſon who made a conveyance by leaſe and releaſe, had only a reverſion expectant on a term for years, and this circumſtance does not appear to have been noticed, either by the counſel who argued the caſe, or the judges who determined it.

§ 11. It is now a common practice to convey eſtates in remainder and reverſion, expectant on eſtates for life, by leaſe and releaſe; but in caſes of this kind it is an inaccuracy to ſay, that the releaſee is in actual poſſeſſion of the hereditaments compriſed in the bargain and ſale for a year. The proper expreſſion is, that they are actually veſted in him, by virtue of the bargain and ſale, and the operation of the ſtatute of uſes. 1 Inſt. 270 *a*. n 3.

§ 12. It has been already obſerved, that no uſe can be raiſed on a bargain and ſale, without ſome pecuniary conſideration, but when the conveyance by leaſe and releaſe became a common aſſurance, only a nominal conſideration of five ſhillings was mentioned in What Conſideration neceſſary.

the deed of bargain and ſale; and even a reſervation of a pepper corn rent has been held ſufficient to raiſe a uſe in a bargain and ſale for a year, to ground a releaſe.

Barker v. Keate, 1 Freem. 249. 2 Mod. 253.

§ 13. A bargain and ſale was made for a year, by the words, *demiſe, grant, and to farm let*, yielding and paying a pepper corn rent, and it was made a queſtion, whether a releaſe could operate upon it, ſo as to make a good tenant to the *præcipe*. It was argued, that this was only a leaſe at common law, for the words, demiſe, grant, and to farm let, are words uſed at the common law, and there was no word of conſideration, nor of bargain and ſale in the deed; ſo that it could not be intended by the parties that it ſhould operate by way of uſe.—2d, That the conſideration was executory, and alſo contingent, for this rent of a pepper corn was not to be paid unleſs it was demanded, which was uncertain whether it would or not; beſides it was not payable preſently, and a future conſideration could not raiſe a preſent uſe.

3d, That the conſideration of a pepper corn was of no value to raiſe a uſe.

But all the court was of opinion, that this leaſe operated by the ſtatute of uſes; for as to the firſt objection, they ſaid it had been often adjudged, that though there were not the words bargain and ſell, yet it would operate by way of uſe, there being a ſufficient conſideration.

As to the ſecond objection, they held, that though this rent was to be paid futurely, yet it was a preſent duty, and the obligation to pay it was preſent, for the words, yielding and paying, make a covenant: and *North* ſaid, that where things are done in the ſame inſtant, they would tranſpoſe them, and ſuppoſe a precedency, it being to ſupport common aſſurances, and ſo they might ſuppoſe the covenant to pay rent, to precede the raiſing of the uſe, and then the conſideration would be executed. *North* alſo ſaid, he had known it ruled ſeveral times, that a leaſe and releaſe in the ſame deed was a good conveyance, for priority ſhould be ſuppoſed. As to the third, they all held that the value of the conſideration was not material, for it was uſual, if an eſtate was of the value of a thouſand pounds a year, to make five ſhillings the conſideration in a bargain and ſale for a year; and by *Porter's* caſe, 1 *Rep.* 24. a penny was ſufficient to alter the uſe of a feoffment, and to cauſe the feoffee to be ſeiſed to his own uſe.

Judgment was given that the word, grant, would make the land paſs by way of uſe, and that the reſervation of a pepper corn was a ſufficient conſideration to raiſe a uſe. 2 Mod. 253.

§ 14. There is no neceſſity for expreſſing any conſideration in a deed of releaſe to a bargainee for years, becauſe ſuch releaſe is a common law conveyance.

§ 15. In error upon a judgment given in the Court of Common Pleas, the caſe was, that *Thomas Aſhby* demiſed Shortridge v. Lumplugh, 2 Ld. Ray. 798.

demiſed the premiſes in queſtion to *John Griffith*, for ſixty-one years, reſerving rent. That afterwards ſaid *Thomas Aſhby*, by indenture dated 28th *September*, in conſideration of five ſhillings, bargained and ſold the premiſes, to Sir *William Meadows* and others, for one year, and by indenture dated 29th *September*, he releaſed and confirmed the ſaid premiſes, to ſaid *Meadows* and others in fee.

It was contended that this reverſion did not paſs to the releaſees, becauſe there was no conſideration expreſſed in the releaſe, nor any uſe declared of it.

But all the court held that the eſtate was well veſted in the releaſees; though no conſideration was expreſſed in the releaſe.

A Leaſe and Releaſe does not deveſt an Eſtate.

S. 600.

Willes R. 383.

§ 16. A conveyance by leaſe and releaſe does not deveſt any eſtate, or create a diſcontinuance or forfeiture. For *Littleton* ſays—"By force of a releaſe "nothing ſhall paſs but the right which he may law- "fully and rightfully releaſe, without hurt or damage "to other perſons who ſhall have right therein after "his deceaſe."

Whether a Uſe reſults on a Leaſe and Releaſe.

Tit. 11. c. 4. ſ. 16.

2 Ld. Ray. 798.

2 Salk. 678.

7 Mod. 76.

§ 17. It appears to have been doubted, whether there can be a reſulting uſe upon a conveyance by leaſe and releaſe. In the caſe of *Shortridge* v. *Lumpleigh*, it was held that if a leaſe and releaſe was pleaded to *A.* and his heirs, and no conſideration appeared, nor ſaid to whoſe uſe, it ſhould be intended to be to the uſe of the releaſee, and Mr. Juſt. *Powell* ſaid,

ſaid, he was not ſatisfied that the nature of the conveyance would admit of a reſulting uſe, though it was a conveyance much uſed to raiſe uſes upon, to a third perſon, by expreſs words, yet in ſtrictneſs it was a common law conveyance. And if a leaſe were made for forty years, and a releaſe thereupon without conſideration, or limiting of any uſes, it could not be intended to be to the uſe of the leſſor, for the very extinguiſhing the eſtate of the leſſee was a good conſideration.

§ 18. Without queſtioning the caſe put by Mr. Juſtice *Powell*, it may be fairly contended, that in the caſe of a bargain and ſale for a year only, and for a nominal conſideration, with a releaſe thereon, without any conſideration, the uſe would reſult to the original owner, if no uſe was declared. For the extinguiſhment of a term for one year could not be demed a conſideration; and therefore there could be no ground for contending againſt the uſe reſulting in this caſe, as well as upon a feoffment. And the Lord Ch. Juſt. and *Powell* agreed, that if there were a particular uſe limited on a releaſe, the reſt would reſult. Idem. Vide Sanders Uſes V. 2. 73.

§ 19. In caſes of conveyances to uſes under the ſtatute, it is ſaid that the poſſeſſion of the deeds appertains to the feoffees, and not to the *ceſtui que uſe*, becauſe the poſſeſſion of the deeds originally belonged to the feoffees to uſes, in order to enable them to defend the title to the land: and although the ſtatute of uſes transfers the legal eſtate to the *ceſtui que uſe*, yet it does not transfer the deeds; but this doctrine ſeems very To whom the Title Deeds belong. 1 Inſt. 6 *a.* n. 4.

very queſtionable, as feoffees to uſes have now only a ſeiſin of an inſtant, and are never called upon to defend the land. And it ſeems reaſonable to ſuppoſe, that where a ſtatute transfers the legal ſeiſin of lands from one perſon to another; it ſhould alſo transfer the title deeds of ſuch lands, as they muſt be totally uſeleſs in the hands of a perſon who has no connexion with the eſtate.

TITLE

TITLE XXXII.

DEED.

CHAP. XIV.

Of Declarations of Uſes.

§ 1. *Origin and Nature of.*
7. *Muſt be in Writing.*
11. *No Technical Words neceſſary.*
13. *How the Lands ſhould be deſcribed.*
14. *No Conſideration neceſſary.*
15. *Declarations of Uſes made prior to Fines, &c.*
20. *Declarations of Uſes made ſubſequent.*
23. *Who may declare Uſes.*
24. *The King.*
25. *Married Women.*
33. *Infants.*
37. *Idiots, Lunatics, &c.*
38. *The Right to declare Uſes is coextenſive with the Eſtate.*
41. *Uſes may be declared on a Leaſe and Releaſe.*

Section 1.

Origin and Nature of.

WITH reſpect to conveyances derived from the ſtatute of uſes, which are ſaid to operate by tranſmutation of poſſeſſion, they derive their effect from the following principles.

Tit. 11. c. 4. ſ. 12.

Where lands are conveyed by feoffment, fine, or recovery, the legal ſeiſin and eſtate becomes veſted by theſe conveyances in the feoffee, cognizee or recoveror. But if the owner of the eſtate declares his intention, that ſuch feoffment, fine, or recovery, ſhall enure to the uſe of a third perſon, a uſe will immediately ariſe to ſuch third perſon, out of the ſeiſin of the feoffee, cognizee, or recoveror, and the ſtatute will transfer the actual poſſeſſion to ſuch uſe, without any entry or claim.

§ 2. The

§ 2. The deeds by which the uſes of fines and recoveries are declared, (for feoffments to uſes are diſcontinued,) derive their effect from the ſtatute of uſes, and are called declarations of uſes. Where they are executed previous to the levying a fine or ſuffering a recovery, they are called deeds to *lead* the uſes. But if executed ſubſequent to a fine or recovery, they are then called deeds to *declare* the uſes of them.

§ 3. With reſpect to deeds executed prior to the levying a fine or ſuffering a recovery, it was reſolved in 2 *Ja.* 1. 1ſt, That although they were but directory, and did not bind the eſtate or intereſt of the land, yet if the fine, recovery, or other aſſurance was purſued according to the indentures, there could not be any bare averment againſt the indentures taken in ſuch caſe, that after the making of the indentures, and before the aſſurance, by mutual agreement of the parties, it was concluded that the aſſurance ſhould be to other uſes. But if another agreement or limitation of uſes was made by writing, or by other matter, previous to the fine or recovery, as high or higher, then the laſt agreement ſhould ſtand.

Counteſs of Rutland's Caſe, 5 Rep. 42.

2d, That if the form of the indentures was not purſued, as to the quantity of land, or the time within which, *&c.* an averment might be made, that the fine or recovery was to another uſe or intereſt.

3d, That although the indentures were not purſued in circumſtances of time, quantity, perſon, *&c.* yet, if no other new mean agreement could be proved, the aſſurance

aſſurance ſhould be to the uſes contained in the indentures.

§ 4. With reſpect to the deeds executed ſubſequent to the levying a fine or ſuffering a recovery, it was formerly doubted whether they would operate ſo as to direct the uſes of ſuch prior fine or recovery; becauſe where a fine was levied or a recovery ſuffered, without conſideration, the uſe of the land immediately reſulted back to the original owner; and when the uſe was once veſted, it was doubted whether it could afterwards be deveſted, by any ſubſequent declaration or agreement. But it was reſolved in 3 & 4 *Philip & Mary*, that a deed executed four years after a recovery had been ſuffered, was ſufficient to declare the uſes of ſuch precedent recovery. And in a ſubſequent caſe, 28 *Eliz.* it was unanimouſly reſolved, that an indenture, ſubſequent, was ſufficient to direct and declare the uſes of a precedent recovery: and the words of the deed being, that the intent and meaning of the parties at the time of the ſaid recovery was, that the recoverors ſhould ſtand ſeiſed to the uſes ſet forth in the indenture, and to no other uſe, intent, or purpoſe, no averment could be admitted to prove that no ſuch uſes had been declared, at the time when the recovery was ſuffered; and the ſubſequent deed proved that there was a preſent, certain, and compleat agreement, and declaration of the uſes, at the time of the recovery, for ſo the indenture expreſsly purported.

Tit. 11. c. 4. f. 16.

Arthur v. Baſſet, Dyer 136.

Dowman's Caſe, 9 Rep. 7 *b.*

§ 5. A deed

§ 5. A deed executed after the ſuffering a recovery may be controlled by a ſubſequent deed.

Vaviſor's Caſe, Dyer 307 *b.*

§ 6. Thus, where a feme ſole ſuffered a recovery of her eſtate, and by an indenture ſubſequent, made between her and *A. B.*, whom ſhe afterwards married, agreed, that after the ſolemnization of the marriage, the recoverors ſhould ſtand ſeiſed to the uſe of the huſband and wife and their heirs. The marriage took effect, and afterwards the recoverors conveyed the eſtate to the huſband and wife and their heirs. Some time after the huſband and wife, by indenture made between them, and the heir of the wife, on the part of her father, reciting, that as the land came to her from her father, and as ſhe had no iſſue, notwithſtanding the indenture and conveyance aforeſaid, the true intent was only that the iſſue of the body of the wife ſhould inherit the land, and for default thereof her right heirs; It was agreed that the huſband and wife, in future, ſhould ſtand ſeiſed thereof to the uſe of themſelves in ſpecial tail; remainder to the right heirs of the wife. It was reſolved that the uſes were altered by the ſecond deed.

Muſt be in Writing.

§ 7. Thus ſtood the old law reſpecting declarations of uſes. But, it was enacted by the ſtatute of frauds, 29 *Ch.* 2. c. 3. ſ. 7. "That all declarations or crea-"tions of truſts or confidences, of any lands, tene-"ments, or hereditaments, ſhall be manifeſted and "proved by ſome writing, ſigned by the party who is "by law enabled to declare ſuch truſt, or by his laſt "will

"will in writing, or elſe they ſhall be utterly void, "and of none effect."

§ 8. Upon the conſtruction of this ſtatute, Lord Ch. Juſt. *Holt* appears to have been of opinion, that uſes might be declared by writing only, without ſeal. 7 Mod. 76.

By the ſtatute 4 *Ann.* c. 16. ſ. 15. reciting, that it had been doubted, whether, ſince the ſtatute of frauds, the declarations or creations of uſes, truſts, or confidences, of any fines or common recoveries, manifeſted by deed, made after the levying or ſuffering of ſuch fines or recoveries, were good and effectual in law; it is thereby declared—"That all "declarations or creations of any uſes, truſts, or "or confidences, of any fines or common recoveries, "of any lands, *&c.* manifeſted and proved, or which "thereafter ſhould be manifeſted and proved, by any "deed then made, or thereafter to be made, by the "party who was by law enabled to declare ſuch uſes "or truſts, after the levying or ſuffering of any ſuch "fines or recoveries, were and ſhould be as good "and effectual in the law, as if the ſaid act had not "been made.

§ 9. It is obſervable that in this ſtatute, the word deed is uſed inſtead of writing, from whence it may be contended that a deed to which a ſeal is eſſential is now required in all caſes, to declare uſes; but this ſtatute does not repeal the clauſe alluded to in the ſtatute of frauds, it is only explanatory of it, and if

taken literally, can only be extended to declarations of uſes made ſubſequent to a fine or recovery, and not to thoſe made prior.

Exception, Doug. 25.

§ 10. The clauſe in the ſtatute of frauds, which requires that delarations of uſes, truſt, and confidences, ſhould be in writing, extends in the caſe of fines, to third perſons only, and not to the cognizors and cognizees of the fine. For the reſulting uſe to the cognizors may be rebutted in favour of the cognizees, by parol evidence, ſhewing ſuch to have been the intention of the parties. The caſes on this ſubject have been already ſtated.

Vide Tit. 11. ch. 4. ſ. 38.

No Technical Words neceſſary. 1 Ld. Raym. 260. 3 P. Wms. 209.

§ 11. No technical words are neceſſary in a declaration of uſes, and Lord Ch. Juſt. *Holt* has ſaid, that it is not abſolutely neceſſary to inſert the word uſe, in the declaration of uſes of a fine; for any kind of agreement which manifeſtly ſhews the intent of the parties, will be ſufficient.

1 Ld. Raym. 291. 12 Mod. 163.

§ 12. It is laid down by Lord *Holt*, *arguendo*, that if *A.* bargains and ſells to *B.* and his heir, and the deed is not inrolled; or if a deed of feoffment is not executed by livery; if a fine be levied between the ſame parties, the deed of bargain and ſale, or feoffment, will declare the uſes of the fine.

How the Lands ſhould be deſcribed.

§ 13. In a declaration of the uſes of a fine or recovery, the lands ought to be deſcribed with as much minuteneſs as in a feoffment or grant: for as lands are deſcribed in a fine or recovery in the ſame manner

as

as in a *præcipe quod reddat*, that is, only by the number of meſſuages, cottages, acres of arable, meadow, *&c.* it is proper to have a more particular deſcription in the deed of uſes, which is the meaſure that uſually guides juries in aſcertaining the eſtates compriſed in a fine and recovery. And there are many inſtances where the Court of Common Pleas has directed the deſcription of lands in fines and recoveries to be amended, in conformity to the deed by which the uſes were declared: hence there is an obvious propriety in connecting the deſcription in the fine, with the deſcription in the deed. There is alſo an advantage in ſtating in the deed, the deſcription contained in the fine.

Vide Tit. 35. 36.

§ 14. No conſideration is neceſſary to raiſe uſes on a fine or recovery, although in the caſe of a bargain and ſale, and covenant to ſtand ſeiſed, it has been ſhewn that a conſideration is abſolutely neceſſary. The reaſon of this difference is thus explained by Mr. *Hargrave*—"In the former caſe" (that of a declaration of uſes) "the eſtate is paſſed completely from "the grantor or donor, without the aid of a court of "equity, and therefore it is immaterial whether the "uſe declared on the eſtate is gratuitous, or not; it "being ſufficient that the grantees or donees receive "it, coupled with a truſt or uſe. But in the latter "caſe (*viz.* that of a bargain and ſale, or covenant to "ſtand ſeiſed) the tranſaction reſts in covenant or "agreement, between the covenantor or bargainor "and the *ceſtui que uſe*, and if the covenant or agree-"ment was not founded on the conſideration of

No Conſideration neceſſary.

1 Ld. Raym. 290.

1 Inſt. 123 *a*. *n*. 8.

" blood, or a valuable conſideration, ſuch as marriage " or money, our courts of equity, which, till the " 27 *Hen.* 8. had the ſole cognizance of uſes, would " not interpoſe to compel the performance. In fewer " words, chancery would enforce uſes annexed to a " perfect gift, however gratuitous they might be, but " not thoſe reſting on a naked contract, without even " ſo much as the conſideration of blood to maintain " them."

Declarations of Uſes made prior to Fines or Recoveries.

§ 15. It has been ſtated, that where a deed declaring the uſes of a fine or recovery is executed, previous to the levying the fine or ſuffering the recovery, it is called a deed to lead the uſes of ſuch fine or recovery; and although the ſtatute of frauds requires, that all declarations of uſes ſhall be manifeſted by ſome writing, which excludes all averments, yet no other alteration in the law, as laid down in the Counteſs of *Rutland*'s caſe, has taken place.

Ante f.

Jones v. Morley, 1 Ld. Raym. 287. 2 Mod. 159.

§ 16. *Ann Bowyer* being ſeiſed in fee of the manor of *Trencham*, by indentures of leaſe and releaſe, in conſideration of a marriage then intended between her and *Edward Morley*, and an agreement on the part of *Morley*, to ſettle a jointure on her of 300*l.* a year, conveyed the ſame to truſtes, in truſt for herſelf and her heirs, until the marriage took effect, and the jointure was made, and afterwards to the uſe of *Edward Morley* and his heirs. The marriage took place, and ſoon afterwards a ſecond deed was executed, dated 29th *January* 1665, between the ſaid *Edward* and *Ann* of the firſt part, and truſtees on the

the other part, reciting, that a fine was already acknowledged and agreed to be levied in due form of law, next *Hilary* term, between the truſtees named in that deed, and the ſaid *Edward* and *Ann* his wife, of the ſaid manor of *Trencham*, it was declared that the ſame ſhould enure, to the uſe of the ſaid *Edward* and his heirs. Two days after the execution of this laſt deed, and before the fine was levied, a writing indented was executed between the ſaid *Edward Morley* of the one part, and the ſaid *Ann* his wife, of the other part, whereby they both, in conſideration of the marriage, and other good cauſes, did covenant, conſent, and agree to revoke all former grants, bargains, contracts, writings, covenants, and obligations, made or done between them, until the ſaid *Edward* had performed the agreements in the ſaid marriage ſettlement, on his part; and that in default thereof, it might be lawful for the ſaid *Ann* and her heirs, to enter into the ſaid manor and land, conveyed by the ſaid ſettlement, without the let of the ſaid *Edward* or his heirs.

The fine was levied *octabis Purificationis*, which was the 9th of *February* in that term. *Edward Morley* did not ſettle a jointure, purſuant to the agreement, and *Ann* his wife died without iſſue. The queſtion was, whether the fine ſhould enure to the uſe of *Edward Morley* and his heirs, according to the deed of the 29th *January*; or to the uſe of *Ann* his wife, and her heirs, according to the deed of the 31ſt *January*.

The Court of King's Bench was unanimouſly of opinion, that the fine did not enure to the uſes declared by the deed of the 29th of *January;* but that this deed was controlled by the writing of the 31ſt of *January;* to prove which Lord Chief Juſtice *Holt* premiſed three things. 1ſt, If it be covenanted by deed to levy a fine of lands, *&c.* to ſuch perſons and uſes, and the fine is levied purſuant to the deed; no proof whatever, by parol, ſhall be admitted, to prove that this fine was levied to other uſes than thoſe which are contained in the deed; but a ſubſequent deed may alter the uſes of the fine, though a parol agreement (as this writing between a huſband and wife is not a deed, but amounts to a particular declaration) cannot. But if there be a variance between the deed and the fine, in any circumſtance, then the parties may aver the fine to be levied to other uſes.

2d, Though there be a variance between the deed and the fine, yet if nothing appear to the contrary, the fine ſhall be taken to be to the uſes of the deed, and in that caſe the deed is not only evidence of the uſes, but the fine is by conſtruction of law to the uſes of the deed.

3d, If the fine had agreed with the deed, the uſes limited by the deed could not have been controlled by the writing of the 31ſt *January;* becauſe, though the deed of a feme covert is not valid in law, yet the deed having relation to the fine takes validity from thence, and will conclude her.

From

From theſe premiſes his lordſhip concluded, that the fine could not be to the uſe of the deed of the 29th of *January*, becauſe the fine to be levied by that deed ought to have been levied the *Hilary* term next following, excluſive of that *Hilary* term in which the deed was made: but the fine was levied in the ſame *Hilary* term in which the deed was made, and therefore there was a variance between the fine and the deed, and conſequently room was left for averment; for if the deed had been purſued, the wife would have had twelve months to ſee whether the huſband would perform the marriage agreement, and if he would not, ſhe might have refuſed to join in levying the fine, of which benefit ſhe was deprived, by its having been immediately levied. Then the huſband, by the writing of the 31ſt of *January*, agreed to the terms ſtipulated in the marriage ſettlement, and the fine was levied accordingly, from whence it manifeſtly appeared, that the agreement contained in the deed of the 29th of *January* was relinquiſhed, and the new agreement of the 31ſt was deſigned to lead the uſes of the fine.

It was agreed by the whole court, that the writing of the 31ſt of *January* was a ſufficient declaration of the uſes of the fine; and if it were not, yet it would be ſufficient to controul the deed of the 29th, for it was there agreed, that all deeds, conveyances, *&c.* made in contradiction to the marriage ſettlement, ſhould be null and void; then if no uſe could ariſe under the deed of the 29th, the uſe reſulted to the

wife and her heirs, and judgment muſt be given for the heir of the wife.

Show. Parl. Ca. 140.

Upon a writ of error this judgment was affirmed by the Houſe of Lords.

§ 17. A ſecond deed to lead the uſes of a fine or recovery, muſt be executed by all thoſe who were parties to the firſt deed, and were concerned in intereſt, in order to render the firſt deed void; for if the ſecond deed be only executed by ſome of the parties concerned in intereſt, and not by all of them, it will not avoid the firſt deed.

Stapilton v. Stapilton, 1 Atk. 2.

§ 18. *Philip Stapilton* being tenant for ninety-nine years, if he ſhould ſo long live, with remainder to truſtees to preſerve contingent remainders, remainder to his firſt and other ſons, and having two ſons, *Henry* and *Philip*; the father and ſons, by deeds of leaſe and releaſe, dated the 9th and 10th *September* 1724, conveyed the premiſes to two perſons as tenants to the *præcipe*, for the purpoſe of ſuffering a common recovery, which was to enure, as to part, to the uſe of *Philip* the father for life, remainder to *Henry* the ſon for life, remainder to his firſt and other ſons in tail, remainder to *Philip* the ſon for life, remainder to his firſt and other ſons in tail, *&c.* There were covenants to ſuffer a recovery within twelve months, and likewiſe for further aſſurances. Before any recovery was ſuffered, *Henry* the ſon died, leaving iſſue *Henry* the plaintiff. Afterwards, by leaſe and releaſe,

12th

12th and 13th *April* 1735, to which the heir of the furviving truftee, in the original ſettlement of 1661 was a party, *Philip* the father and *Philip* the ſon covenanted to ſuffer a recovery of the ſame premiſes, to the uſe (as to part) of *Philip* the father, his heirs and aſſigns; and as to the other part, to the uſe of *Philip* the father for life, remainder to *Philip* the ſon in fee.

In *Trinity* term 1725, a recovery was ſuffered, in which were the ſame tenant to the *præcipe*, the ſame demandant and vouchees (except *Henry* who was dead) as were covenanted to be by the firſt deed. It was likewiſe ſuffered within twelve months after the execution of the firſt deed. It was proved in the cauſe that *Henry* the ſon, who died before the recovery was ſuffered, was a baſtard; and the queſtion was, whether the ſon of *Henry* was entitled to the premiſes under the declaration of uſes made in the year 1724? or whether that declaration was avoided by the ſubſequent declaration in 1725?

Lord *Hardwicke*.—The firſt queſtion in this caſe is, whether the leaſe and releaſe of the 9th and 10th of *September* 1724, will amount to a good declaration of the uſes of the recovery, notwithſtanding the ſubſequent deed of *April* 1725? I am ſtrongly inclined to think that the leaſe and releaſe of 1724, will amount to a good declaration of the uſes of the recovery. This queſtion depends on the conſtruction of law, and the authority of caſes upon the declaration of uſes. It is true, where there is an agreement to ſuffer

a recovery, and uſes are declared, if the recovery is afterwards ſuffered, though it varies in point of time from the recovery covenanted to be ſuffered; yet if there be no ſubſequent declaration of uſes, the recovery will enure to the uſes ſo declared; and before the ſtatute of frauds, if the deed declaring the uſes had not been purſued, a parol declaration of the uſes would have been admitted; but if there was a deed declaring the uſes, and the recovery was ſuffered accordingly, that would, before the ſtatute, have excluded a parol declaration of new uſes. But even now there may be a ſubſequent declaration of other uſes, but that declaration muſt be in writing, and ſuch a new declaration of uſes depends upon the agreement of the parties: therefore though it was ſaid at the bar, that the declaration of uſes is in the power of the tenant in tail, and that he may declare new uſes, I take that not to be law; for ſuch ſubſequent declaration of uſes muſt be by all the parties concerned in intereſt; and in the caſe of the Counteſs of *Rutland*, it is not laid down that the tenant in tail may declare new uſes, but it is ſaid, *whilſt it is directory only, new uſes may be declared;* and the meaning of that is, that as the new uſes muſt ariſe out of the agreement of the parties, the parties may change the uſes, but that muſt be done by the mutual conſent of all the parties concerned in intereſt, and in that caſe it was a mutual agreement of all the parties. But in the preſent caſe, the ſecond agreement not being between all the parties concerned in intereſt, ought not to controul the firſt declaration, and eſpecially as the recovery was ſuffered within the time preſcribed by the

5 Rep. 25.

the firſt deed, and between the ſame demandant and tenant.

§ 19. A man and his wife, in the year 1692, made a mortgage of the wife's eſtate, and covenanted in the mortgage deed to levy a fine of the premiſes in the *Eaſter* term following. The fine was not levied till *Trinity* term 1695. Afterwards, but in the ſame year, in conſideration of more money, they joined in a conveyance of the equity of redemption, and covenanted that the fine which had been levied ſhould be to the uſes of this laſt deed. Fleetwood v. Templeman, 2 Atk. 79.

Lord *Hardwicke* ſaid, he was inclined to think, as the covenant to levy the fine under the firſt deed was confined to a particular term, and was not levied till after that, the huſband and wife might by the deed in 1695, covenant that the fine which had been levied, ſhould be to the uſes of the latter deed; and that the former deed in 1692 might be laid out of the caſe, as the covenant under it for levying the fine in *Eaſter* term was not ſtrictly purſued.

§ 20. With reſpect to declarations of uſes executed after a fine has been levied or a recovery ſuffered, the the principles laid down in *Dowman*'s caſe, and *Vaughan*'s caſe, have been applied to them in modern times, as fully as they were previous to the ſtatute of frauds. And in a modern caſe, a deed declaring the uſes of a fine four years after it was levied was determined to to be good, the jury having found that the fine was levied to the uſes of the deed. Declarations of Uſes made ſubſequent.

Buſhell v. Burland, 11 Mod. 196. Holt. R. 733.

§ 21. *A.* and *B.* his wife levied a fine, and four years after they, by deed, declared the uſes of it, in which were the following words—" All and every " fine or fines, levied or to be levied, ſhall be to the " uſes of the deed."

The queſtion was, whether the uſes of the fine were well and ſufficiently declared by this ſubſequent deed.

Lord Chief Juſtice *Holt* delivered the opinion of the Court, that the uſes were well declared, the jury having found that the fine was levied to the uſes therein declared. The court was alſo of opinion, that notwithſtanding the ſtatute of frauds, a ſubſequent deed is now as good, as it was before that ſtatute was made.

§ 22. It is now the uſual practice, where a fine is intended to be levied to uſes, to execute a deed previous to the fine, in which the intended cognizor covenants to levy a fine and a declaration is inſerted in the deed, of the uſes to which the fine, when levied, ſhall enure. And where a recovery is intended to be ſuffered, a deed is executed to make a tenant to the *præcipe* with an agreement to ſuffer a recovery, and a declaration of the uſes of the recovery is inſerted in the deed.

Who may declare Uſes.

§ 23. With reſpect to the perſons who are capable of declaring uſes, not only all thoſe to whom the law, in other inſtances, gives a diſpoſing power, are capable

ble of declaring uſes, but alſo ſome perſons who are incapacitated from conveying away their eſtates by any other kind of aſſurance.

§ 24. It is ſaid by Lord *Bacon*, that the king may declare a uſe on his letters patent, though, if no uſe be declared, the letters patent imply a uſe. The King.

§ 25. As a married woman is allowed to join with her huſband in levying a fine, or ſuffering a recovery, and to bind herſelf by thoſe aſſurances, ſhe is alſo allowed to join with her huſband in declaring the uſes of ſuch fine or recovery; for, otherwiſe, the privilege of joining with her huſband, in levying a fine, or ſuffering a recovery, would be nugatory, as the eſtate would immediately reſult to the former uſes. Married Women. Vide Tit. 35, 36. Vide Tit. 11. ch. 4. ſ. 16.

§ 26. If the huſband alone declares the uſes of a fine, levied by him and his wife of the lands of the wife, it will bind the wife, unleſs her diſſent appears; for, when ſhe joined her huſband in the fine, it ſhall be preſumed that ſhe alſo joined him in the agreement, reſpecting the declaration of the uſes, unleſs the contrary is proved. 2 Rep. 57 *a*. Luſher v. Banbing, Dyer 290 *a*. Harrington's Caſe, Ow. 6.

§ 27. A huſband and wife joined in a fine of the wife's lands to a purchaſer, and, afterwards, the huſband alone declared the uſes of it by articles. The queſtion was, whether it ſhould bind the wife. Swanton v. Raven, 3 Atk. 105.

Lord *Hardwicke*.—As no other deed is ſhown that declares different uſes, and the uſes declared do not vary

vary from what the wife intended, it ſhall bind her notwithſtanding. And, therefore, the bill which ſhe has brought, after an acquieſcence of fifteen years ſince her huſband's death, for poſſeſſion, on ſuggeſtion that ſhe is not bound by the fine, as ſhe did not join in the articles with the huſband, muſt be diſmiſſed.

Webb v. Worsfield, 2 Roll Ab. 798.

§ 28. If a huſband and wife levy a fine of the wife's eſtate, and an indenture is prepared in the name of the huſband and wife, declaring the uſes of ſuch fine, and the huſband ſeals and delivers it, but the wife refuſes to do ſo, it will not bind her, becauſe her refuſal to execute the declaration of uſes is a ſufficient proof of her diſſent.

Gilb. Uſes 248.

§ 29. If the wife alone declares the uſes of a fine, levied by her and her huſband of her land, ſuch declaration will be void, becauſe, being *ſub poteſtate viri*, ſhe cannot limit the uſe without the concurrence of her huſband. On the other ſide, the huſband, who has no eſtate in his own right, cannot declare the uſes of ſuch a fine, without the expreſs or implied concurrence of the wife; ſo that the one is not *ſui juris*, although ſhe has the eſtate, and the other is *ſui juris*, but has not the eſtate: hence it follows, that when they make different declarations, ſuch declarations are both void.

2 Rep. 57 *b*.

Beckwith's Caſe, 2 Rep. 56.

§ 30. *Chriſtopher Kenne*, and *Elizabeth* his wife, being ſeiſed in fee, in right of the ſaid *Elizabeth*, an indenture was executed by *Elizabeth*, without the conſent of her huſband, by which the ſaid *Elizabeth* alone limited

limited and declared the uſes of a fine, which afterwards ſhould be levied. Eight years after, the huſband executed an indentnre, without the conſent of his wife, by which uſes were declared, different from thoſe contained in the indenture executed by the wife. The fine was afterwards levied by the huſband and wife, to the conuſees mentioned in the indenture executed by the wife, and it was found that there were no other uſes declared of it.

It was determined, that both the limitations and declarations of the uſes were void; and that the ſaid fine was, by conſtruction of law, to the uſe of the wife and her heirs.

§ 31. It was alſo reſolved in this caſe, that, if the huſband and wife agree in the declaration of the uſes of part of the land, and vary in the declaration of the reſidue, it will be good for the part in which they agree, and void for the reſidue. "For (ſays *Gilbert*) "as to that part in which they both agree, all the "requiſites are found neceſſary to make a declaration; "and the defect of the other part can have no influence on that which is good: but if they agree in "the limitation of uſes for part of the eſtate in the "land, and diſagree in the other eſtates, there, all is "void; for elſe there will be another moulding of the "eſtates than the wife deſigns, and her conſent is requiſite to every eſtate that ſhall be created by the "limitation of uſes, and it is to be ordered by her direction. Thus, if the huſband declares the uſes to "himſelf and wife for life, the remainder to the heirs "of

2 Rep. 58 a.

Gilb. Uſes 216.

" of the wife, and the wife declares the uſes to her-
" ſelf for life, and then to her own right heirs, both
" declarations are void, and it ſhall not ſtand good for
" the remainder in fee, and be void for the reſt, for,
" the eſtate moving from the wife, whatever uſes do
" take effect muſt be by her direction and conſent, and
" in the manner ſhe pleaſes: though the huſband has
" power over the eſtate of the wife during coverture,
" yet, if ſhe declares the uſe one way, and he an-
" other, his direction is abſolutely void, and it ſhall
" not ſtand during the coverture. The reaſon of the
" difference ſeems, that, in other caſes, the huſband,
" having power over the wife's eſtate, he may grant
" an intereſt as from himſelf during the coverture, for
" ſo long as he has power over her eſtate; but when
" they levy a fine in fee, the eſtate paſſes ſolely and
" entirely as one eſtate in fee-ſimple from the wife,
" and the uſes that are declared thereupon, muſt be all
" with the conſent of the wife for the whole eſtate;
" becauſe the whole eſtate and intereſt paſſes from the
" wife."

Johnſon v. Cotton, Skin. 275.

§ 32. It was laid down in a ſubſequent caſe, that if a married woman alone declares the uſes of a fine, the aſſent of her huſband ſhall not be intended, if nothing appears to the contrary. But the declaration is void, unleſs an expreſs aſſent appears.

Infants. 2 Rep. 58 *a.* 10 Rep. 42 *b.* Bac. Read. 67.

§ 33. It is ſaid by the Judges in *Beckwith's* caſe, that if an infant levies a fine, and declares the uſes of it, ſuch declaration ſhall bind him, as long as the fine remains in force; for, inaſmuch as he hath been admitted

mitted by the Judges to levy a fine, the law will permit him to declare the uſe thereof, and ſuch declaration will be valid as long as the fine.

§ 34. It has, however, been determined, that an agreement entered into by an infant, to levy a fine, and ſuffer a recovery, when he came of age, to certain uſes, will not operate as a declaration of the uſes of ſuch fine or recovery.

§ 35. The Earl of *Ferrers* being tenant for life, with remainder to his firſt and other ſons in tail male, and having a ſon who was about 17 years old, a very advantageous match had been agreed upon between ſuch ſon and a young lady, and articles were entered into by Lord *Ferrers* and his ſon, whereby Lord *Ferrers* covenanted, that he and his ſon ſhould, within a year after the ſon came of age, by fine or recovery, ſettle the bulk of his eſtate to the uſe of the ſon for life, remainder to his firſt and other ſons in tail, *&c.* The marriage took effect, and the infant ſon having thus executed this deed during his infancy, afterwards came of age, and, purſuant to his covenant, joined with his father in levying a fine and ſuffering a common recovery; but there was no declaration of uſes. The queſtion was, whether theſe articles amounted to a declaration of the uſes of the fine and recovery? And it was determined by Sir *Joſeph Jekyll*, that they did not.

Nightingale v. Ferrers, 3 P. Wms. 207.

§ 36. An infant covenanted to levy a fine by ſuch a time, to ſuch uſes. Before the time he came of age, then

Froſt v. Wolverſton, 1 Stra. 94.

then the fine was levied: and, by another deed made at full age, he declared it to be to other uſes. The court held, the laſt deed ſhould be that which ſhould lead the uſes.

Idiots and Lunaticks, &c.

§ 37. It is alſo ſaid, that if a perſon who is *non compos mentis*, ſuch as an idiot or lunatic, is permitted to levy a fine, his declaration of the uſes of it will be good. But, in caſes of this kind, as well as thoſe of infants, the Court of Chancery will interfere.

Vide Tit. 35. and 36.

The Right to declare Uſes is co-extenſive with the Eſtate.

2 Rep. 57 *b.* Noy 21. 27.

§ 38. The right of declaring the uſes of a fine or recovery, is preciſely co-extenſive with the quantity and nature of the eſtate or intereſt which each of the parties has in the lands. If, therefore, a tenant for life, and the perſon having the remainder or reverſion, join in levying a fine or ſuffering a recovery, they may declare the uſes according to their reſpective eſtates in the land.

2 Rep. 58 *a.* Palm. 405.

§ 39. So, if there be two joint-tenants, who join in levying a fine or ſuffering a recovery, and one declares the uſe in one manner, and the other in another manner: each of them ſhall be good for their reſpective parts; becauſe the declaration of the uſe ſhall be directed and governed according to their ſeveral eſtates and intereſts.

Roe v. Popham, Doug. 24.

§ 40. It was held, in a modern caſe, that where a fine was levied by tenant for life, remainder-man in tail, and reverſioner in fee, a declaration of uſes by the tenant for life, and remainder-man in tail, did not bind the reverſioner.

§ 41. A uſe

§ 41. A uſe may be declared on a releaſe as well as on a fine or recovery; and it has been the conſtant practice, for this laſt century, to make all ſettlements by a bargain and ſale for a year, and a releaſe to uſes: in ſuch caſe, the uſes ariſe out of the ſeiſin of the releaſees, and the uſes of the releaſe are uſually declared in the ſame deed by which the lands are releaſed.

Uſes may be declared on a Leaſe and Releaſe. Caſes and Opinions, v. 2. p. 289.

§ 42. It ſhould, however, be obſerved, that no perſon can declare the uſes of a releaſe, who is not capable of transferring lands by that mode of conveyance; and, therefore, a declaration of the uſes of a releaſe by a married woman, or an infant, would be void.

TITLE XXXII.

DEED.

CHAP. XV.

Of Powers of Revocation and Appointment.

§ 1. *Nature of.*
3. *Diviſion of Powers.*
4. *Powers relating to the Land.*
5. *Powers appendant.*
7. *Powers in Groſs.*
9. *Powers Collateral.*
11. *In what Deeds inſerted.*
12. *By what words created.*
18. *A Power of Appointment implies a Power of Revocation, but not è contra.*
§ 19. *A Power of Appointment includes a Right to reſerve a new Power.*
21. *Exception—Powers Collateral.*
23. *To whom Powers may be given.*
24. *Infants.*
26. *Married Women.*
33. *Who may be Appointees.*
34. *A Power of Appointment does not ſuſpend the veſting of Remainders.*

Section 1.

Nature of. Vide Tit. 11. ch. 4. ſ. 4, 5, 6, 7.

IT has been ſtated in a former Title, that powers of revocation and appointment may be inſerted in all conveyances which derive their effect from the *Statute of Uſes;* and, when executed, the uſes originally declared ceaſe, and new uſes immediately ariſe out of the ſeiſin of the cognizees, recoverors, or releaſees, to the perſon named in the appointment; and the ſtatute transfers the legal eſtate to the appointees, who, by that means, acquire the legal eſtate and poſſeſſion.

§ 2. Powers were ſoon found to be much more convenient than conditions, and were therefore gene-

 rally

rally introduced into family ſettlements; and, although ſeveral of theſe powers are not uſually called powers of revocation, ſuch as powers of jointuring, leaſing, and charging lands with the payment of a ſum of money, yet all theſe are in fact powers of revocation, for they operate as revocations *pro tanto* of the preceding eſtates.

Diviſion of Powers. Gilb. Uſes 141. Hard. R. 410. 415. Cowp. R 263.

§ 3. Powers of revocation and appointment may be reſerved, either to the original owners of the land, or to mere ſtrangers; from whence ariſes the general diviſion of powers into thoſe which relate to the land, and thoſe which are collateral to it.

Powers relating to the Land.

§ 4. Powers relating to the land, are thoſe which are given to ſome perſon having an eſtate or intereſt in the land, over which they are to be exerciſed. Theſe powers are again ſubdivided into two ſorts: Powers Appendant, and in Groſs.

Powers Appendant.

§ 5. A power appendant, is where a perſon has an eſtate in land, with a power of revocation and appointment, the execution of which falls within the compaſs of his eſtate; as, where a tenant for life has a power of making leaſes for a certain number of years.

6 Rep. 18 *a*. 1 Inſt. 216 *a*. n 2. Vide Cox v. Chamberlain, *infra*, ch. 16.

§ 6. It was reſolved in Sir *Edward Clere's* caſe, that if a man, ſeiſed of lands in fee, makes a feoffment to the uſe of ſuch perſon or perſons, and of ſuch eſtate and eſtates as he ſhall appoint by his will, that, by operation of law, the uſe doth veſt in the feoffor, and he is ſeiſed of a qualified fee, that is to ſay, till de-

claration and limitation be made according to his power.

Powers in Groſs.

§ 7. A power in groſs is, where a perſon has an eſtate in the land, with a power of revocation and appointment, the execution of which falls out of the compaſs of his eſtate; but, notwithſtanding, is annexed in privity to it, and takes effect in the appointee, out of an intereſt veſted in the appointor.

§ 8. Thus, where a tenant for life has a power of creating an eſtate, to commence after the determination of his own, ſuch as a power to ſettle a jointure on his wife, or to create a term for years, to commence in poſſeſſion after his own death, theſe are called *Powers in Groſs;* becauſe the eſtate of the perſon to whom they are given, will not be affected by the execution of them.

Powers collateral.

Booth's Opin. Caſes & Opin. vol. 1. 421.

§ 9. Powers collateral, are thoſe which are given to mere ſtrangers, having no eſtate or intereſt in the land. Thus, where powers of ſale and exchange are given to truſtees in a marriage-ſettlement, they are ſaid to be collateral to the land, being reſerved to ſtrangers.

Cowp. R. 263.

§ 10. A power relating to the land, is part of the old dominion, and is therefore favourably expounded: whereas a power collateral to the land, being reſerved to a mere ſtranger, is conſidered in the light of a bare authority, and is therefore conſtrued ſtrictly.

§ 11. Powers

§ 11. Powers are, in general, only inſerted in deeds which operate by tranſmutation of poſſeſſion, that is, in declarations of uſes of fines and recoveries, or in releaſes; for it is ſomewhat doubtful, whether powers can be inſerted in a bargain and ſale, or covenant to ſtand ſeiſed, becauſe, in theſe, a conſideration is abſolutely neceſſary; and powers are often given to raiſe eſtates without any conſideration. In what Deeds inſerted. Goldſb. 173.

§ 12. In the creation of a power, there is no neceſſity for any technical words, as it will be ſufficient, if the intention of the party who creates the power, be clearly manifeſted. By what Words created.

§ 13. Thus, where the words, "and if the ſaid *A. B.* ſhall make any eſtate in fee-ſimple or fee-tail, "then the uſe ſhall be," &c. were inſerted in a deed without mentioning what lands, it was reſolved, that they ſhould be intended of the lands compriſed in the deed, and ſhould be a ſufficient creation of a power. Snape v. Turton, 2 Roll. Ab. 262.

§ 14. So, if the words are, "it ſhall be lawful for "*B.* to alter, change, &c. any uſe, and to limit "new—or that, after altering, changing, &c. ſaid "uſes, the fine ſhould be to the uſes newly limited." Moo. 611.

§ 15. *A.*, on his marriage with *B.*, conveyed lands to *C.* in truſt for himſelf for life, remainder to *B.* for life, remainder to the heirs of their two bodies, remainder to *A.* in fee: proviſo, that in default of iſſue of the marriage, *C.* ſhould convey to ſuch uſes as the ſurvivor ſhould appoint. *A.* deviſed the land to *D.*, and died without iſſue. Epiſ. Oxon v. Leighton, 2 Vern. 377.

Tit. 16. c. 5. f. 4.

Lord Keeper *Wright* ſaid, that Lord *Dyer's ſcintilla juris* remained in *C.*, and though the proviſo was unſkilfully penned, yet it amounted to a power of revoking and limiting new uſes.

Kilmarry v. Geery, 2 Salk. 538. Boycot v. Cotton, 1 Atk. 552. Lewis v. Freke, 2 Veſ. Jun. 507.

§ 16. Where a perſon has a power to charge land with a certain ſum of money, he may alſo charge it with the payment of the intereſt of ſuch ſum; for the intention is, to charge the land with the principal money, and that of courſe carries intereſt, otherwiſe no one would lend the money.

Beale v. Beale, 1 P. Wm. 244.

§ 17. Where there was a power to charge lands with portions for younger children, living at the father's death, a child *in ventre ſa mere* was conſidered within the power; for it may be well looked upon, in equity, to be living at the father's death, *in ventre ſa mere.*

A Power of Appointment implies a Power of Revocation, but not *è contra.*

§ 18. Although a power of appointing new uſes implies, in itſelf, a power of revoking the former uſes, becauſe, otherwiſe, the power of appointing new uſes could not be effectuated; yet a power of revocation only, does not imply a power of appointing new uſes. This point is contradicted by Lord Keeper *Finch.* But Sir *John Strange* reports, that upon a trial at Bar in *Eaſter* term 10 *Geo.* 1., the Court of King's Bench was of opinion, that a power of revocation alone did not enable a perſon to limit new uſes. If, upon ſuch revocation, the perſon became ſeiſed in fee, he might diſpoſe of the lands by deed or will, but not by a new declaration of uſes.

1 Cha. Ca. 242. Anon. 1 Stra. R. 584.

§ 19. A power

§ 19. A power of appointment relating to the land, includes in itſelf a right to appoint, either abſolutely, or with a new power of revocation and appointment. But if a perſon once executes a power of revocation and appointment of new uſes, over the whole eſtate, his power is thereby completely exhauſted, unleſs he reſerves to himſelf a new power of revocation and appointment.

A Power of Appointment includes a Right to reſerve a new Power.

§ 20. *Sampſon Hele*, being ſeiſed in fee of the lands in queſtion, conveyed them in 1684, by leaſe and releaſe and fine, to truſtees, to the uſe of himſelf for life, remainder to the uſe of his ſon for life, remainder over. In the releaſe, there was a power given to *Sampſon Hele* to revoke the uſes contained therein, and to limit other uſes; and alſo, to revoke or alter ſuch new limitations, and to declare other uſes.

Hele v. Bond, 1 Ab. Eq. 342. Prec. in Ch. 474.

Sampſon Hele did accordingly, by deed-poll, in 1687, reciting his power, revoke the uſes limited in the releaſe of 1684, and appointed new uſes.

Sampſon Hele, by indenture in 1704, between him and truſtees, reciting the releaſe in 1684, and the power of revocation therein contained, and alſo the deed-poll of 1687, by which he had revoked the firſt uſes and limited new ones, *did, according to the power and authority to him by the ſaid recited indenture, and the proviſo therein ſpecified and contained, given and reſerved*, revoke the uſes limited by the deed-poll, and, by virtue of the ſaid power, appointed new ones.

The

The queſtion was, whether the deed-poll of 1687, and the uſes thereby limited, were well revoked by the indenture of 1704.

The Lord Chancellor declared, that this was a new caſe, and that he did not find any authority to warrant ſuch a revocation; nor was there an inſtance in any of the authorities, which were inſiſted on, of any ſuch power of revocation; but referred it to the Judges of the King's Bench for their opinion, whether the uſes limited by the deed-poll of 1687 were well revoked by the indenture of 1704, by virtue of the power of revocation contained in the indenture of 1684.

The Judges of the King's Bench certified their unanimous opinion to be, "that the power of revocation "in the indenture of 1684, was fully executed by the "deed-poll of 1687; and that the farther power in "the indenture of 1684, to revoke any new appoint-"ment of uſes, was void in its creation as to ſuch "uſes as ſhould afterwards be duly limited, unleſs a "power of revocation ſhould be again expreſsly re-"ſerved, which was not in this caſe; and, conſe-"quently, that the uſes limited by the deed-poll of "1687, were not revoked or annulled by the inden-"ture of 1704."

The Lord Chancellor concurring in this opinion, decreed accordingly.

Printed Ca. Dom. Proc. 1717. Adams v. Adams, Cowp. R. 651.

On an appeal to the Houſe of Lords, the decree was affirmed with the concurrence of all the Judges.

§ 21. But

§ 21. But where a power is collateral to the land, the perſon to whom it is given cannot, upon the execution of it, reſerve to himſelf a new power of revocation. Exception—Powers collateral.

§ 22. Sir *George Crooke* having three daughters only, directed, by his will, that his lands ſhould deſcend and go amongſt his daughters in ſuch ſhares and proportions as his wife by deed ſhould direct and appoint. The wife made an appointment in purſuance of the power, in which, ſhe reſerved to herſelf a power of revocation. Wall v. Thurborne, 1 Vern. 355.

The court ſaid, that as to the power of revocation, the caſe might be eaſed of that, for it was only an authority in the wife, and that being once executed, ſhe could not reſerve ſuch power to herſelf.

§ 23. Powers of revocation and appointment may not only be reſerved to all thoſe who are capable of diſpoſing of lands and tenements, but alſo to ſome perſons who have not by the common law a diſpoſing power: for, whenever a perſon to whom a power is given, executes it, the appointee under the power does not derive any intereſt from the perſon who executes the power, he being conſidered as a mere inſtrument, to carry into execution the intent of the perſon who created the power; but is in immediately by and under the inſtrument by which the power was created. To whom Powers may be given.

§ 24. A power may be given to an infant, but it muſt be expreſsly inſerted in the deed, that the infant may Infants. Vide 2 P. W 229. 671.

may execute ſuch power during his infancy; for an infant cannot execute a power given generally.

Hearle v. Greenbank, 1 Veſey 298. 3 Atk. 695.

§ 25. A man deviſed all his real eſtates to truſtees and their heirs, for the ſole and proper uſe of his daughter during her life, and to be at her diſpoſal, and not ſubject to the debts or contracts of her huſband; and to permit her by deed or writing executed by three witneſſes, notwithſtanding her coverture, to give and diſpoſe of his ſaid freehold eſtate, as ſhe ſhould think proper. The daughter being about ſeventeen, made her will purſuant to the power, and thereby diſpoſed of the eſtate. The queſtion was, whether this execution of the power was not void, on account of the infancy of the daughter.

Lord *Hardwicke* ſaid, this was a queſtion of conſequence, and never determined that he had heard: that he could find no caſe where a power given generally, could be executed by an infant, where an intereſt paſſed from the infant, and, therefore, that he would make none. His Lordſhip, however, obſerved, that if the power had been given, notwithſtanding her infancy, the execution of it would have been good.

Married Women. Ante ch. 2. ſ. 22.

§ 26. By the common law, a power or authority given to a woman was not ſuſpended by her marriage, becauſe the execution of ſuch a power or authority was conſidered as a miniſterial act, in the doing of which, the perſon who exerciſed it had no intereſt.

When

When powers of revocation and appointment were introduced, the Judges reaſoned by analogy from theſe principles, and determined, that coverture did not create an incapacity in a woman to execute a power.

§ 27. A perſon ſettled lands on himſelf for life, remainder to his wife for life, remainder to the iſſue of the marriage, with a proviſo, that it ſhould be lawful for his wife, during her life, to demiſe the premiſes under certain conditions. After the huſband's death, the wife married again; and ſhe and her huſband demiſed the lands purſuant to the power. Bayley v. Warburton, Com. Rep. 494.

It was held, in the Exchequer, that this was a good execution of the power, notwithſtanding the coverture; for the eſtate of the leſſee was not derived from the leſſor, but aroſe out of the eſtate of the feoffees, or releaſees in the original ſettlement.

§ 28. If, however, a power be expreſsly reſerved to a woman, to be executed by her, being ſole, a ſubſequent marriage will, in that caſe, ſuſpend the exerciſe of the power.

§ 29. An unmarried woman ſettled her eſtate on herſelf for life, remainder over, reſerving to herſelf a power, *being ſole*, to make leaſes for three lives; ſhe afterwards married, and executed the power jointly with her huſband. This execution was held not to be purſuant to her power, for, by the marriage, ſhe became ſubject to her huſband: and the Lord Keeper took a diverſity between a naked power, and a power that Antrim v. Becks, 1 Ab. Eq. 343.

that flows from an intereſt; for, where a bare power is given to a feme by will, to ſell lands, although ſhe afterwards marries, ſhe may ſell the lands, even to her huſband: but, where a woman, upon a ſettlement of her own eſtate, reſerves a power which flows from an intereſt, that power ought to be executed by the woman whilſt ſole; and yet, he ſaid, ſuch powers ought to be taken liberally, though, formerly, they were taken ſtrictly.

It is now uſually inſerted in the deed by which the power is created, that a woman ſhall be enabled to execute it, whether ſhe be ſole or married.

§ 30. The proper mode of creating a power of this kind, is to convey the lands to truſtees, to the ſeparate uſe of the wife, remainder to ſuch perſons and for ſuch eſtates, as ſhe ſhall by any deed or writing under her hand, notwithſtanding her coverture, direct or appoint: but although no ſuch conveyance be made, and articles only are entered into previous to a marriage, by which it is agreed, that the wife ſhall have a power to diſpoſe of any eſtate which may deſcend to her, it will be ſufficient, and a court of equity will ſupport ſuch a power.

Wright v. Ld. Cadogan, 6 Brown's Ca. in Parl. 156. Amb. R. 468.

§ 31. By articles before marriage the intended huſband covenanted, that he would execute all ſuch acts and conveyances as ſhould be neceſſary for veſting any eſtate which ſhould deſcend to his wife, in ſuch perſons as his wife ſhould appoint, in truſt for her ſole and ſeparate uſe; and to be ſubject to ſuch diſpoſition

as ſhe ſhould make thereof, by any deed or writing under her hand and ſeal, or by her laſt will and teſtament. The wife became entitled to the truſt of ſome lands, which ſhe deviſed by her will duly atteſted. It was decreed by Lord Chancellor *Northington* that the power was well created, and that the will of the wife was a good execution of it.

On an appeal to the Houſe of Lords, it was contended on the part of the appellant, that the proper and only methods of enabling a feme covert to diſpoſe of her inheritance by deed or will, operating as an appointment, were, either by a conveyance to uſes or truſts before marriage, reſerving ſuch a power, or elſe by fine levied by the huſband and wife after the marriage, with a deed to lead the uſes of it, reſerving ſuch a power to her, over the inheritance veſted in the cognizees. But unleſs one of theſe methods was taken her will of real eſtates would be void, as an inſtrument of conveyance, and could not bind her heirs. Marriage articles being entered into for a valuable conſideration, would bind the huſband to do all proper acts for enabling his wife to make an effectual diſpoſition of her real eſtate, notwithſtanding her coverture: but when thoſe acts had not been done, the heirs of the wife would be entitled to take advantage of all defects in the will, or in the capacity of the teſtatrix; juſt as they would have been entitled to claim by deſcent, in caſe, after a power duly reſerved to her over a uſe or a truſt, ſhe had not thought fit to make any appointment, in execution of that power.

On

On the other ſide it was argued in ſupport of the power, that the legal eſtate was outſtanding in truſtees, and therefore no formal conveyance of it was by any means neceſſary, as ſuch conveyance could not affect the legal eſtate or have any legal operation. It could amount only to a direction to the truſtees, to become truſtees for ſuch perſons, intents and purpoſes, as the wife ſhould by will or deed appoint; and as the intereſt of the wife was only equitable, the general agreement and intention of the parties, clearly and indubitably expreſſed in the articles, were as ſtrong and binding as an equitable conveyance, and did in effect amount to a direction to the truſtees and their heirs, to ſtand ſeiſed of the premiſes, in truſt for ſuch perſon and perſons as ſhe ſhould appoint, and in the mean time for her ſeparate uſe, excluſive of her intended huſband; and eſpecially as the huſband by the articles actually covenanted to do all neceſſary acts to enable his wife to make any ſuch diſpoſition or appointment of her eſtate as ſhe ſhould think fit, either by deed or will; by which covenant he was bound in equity to do all neceſſary acts for authenticating and eſtabliſhing any deed or will which ſhe ſhould make. The decree was affirmed.

Vide Doe v. Staple, 2 Term Rep. 684.

Goodill v. Brigham, 1 Boſ. & Pull. R. 192.

§ 32. In a modern caſe, where a perſon deviſed a farm to his ſiſter, *Eſther Rogers*, her heirs and aſſigns, for ever, and declared that his will further was, that the eſtate thereby given to his ſiſter, ſhould be fully veſted in her, notwithſtanding her coverture, and that ſhe might give, ſell, and diſpoſe of the ſame, as ſhe ſhould think proper. The Court of Common Pleas held

held that the power was void, as being inconſiſtent with the fee given to the deviſee in the firſt inſtance; and that ſhe could not convey without a fine.

It is obſervable that this was not a power given by means of a conveyance to uſes, and that the authority of this caſe has been queſtioned.

Vide Cox v. Chamberlain, infra ch. 16.

§ 33. All perſons capable of taking lands by any common law conveyance, may be appointees. And a married woman may take by appointment from her huſband, becauſe ſhe does not take immediately from him, but from the releaſees to uſes in the deed, by which the power is created.

Who may be Appointees. 1 Inſt. 3 *a*. *n*. 1.

§ 34. It frequently happens that eſtates are ſubject to a power of appointment in the firſt taker, with remainders over in default of ſuch appointment, upon which an opinion has obtained in ſome inſtances, that ſuch a power ſuſpended the effect of the ſubſequent limitations, and kept them in contingency, inſtead of their veſting, ſubject to be deveſted by a ſubſequent execution of the power. But this doctrine has been altered by the following caſes.

A Power of Appointment does not ſuſpend the veſting of Remainders. Tit. 16. ch. 1. ſ. 57. Fearne Cont. Rem. 343.

§ 35. By marriage articles, money was agreed to be laid out in the purchaſe of lands, to the uſe of the huſband for life, remainder to truſtees during his life, to preſerve, &c.; then to the wife for life; then to all and every the child or children to be begotten by the huſband on her body, for ſuch eſtate, &c. proportion, &c. as the huſband and wife during their joint

Cunningham v. Moody, 1 Veſ. 174.

joint lives, by any writing under their hands and ſeals atteſted, &c., ſhould appoint: in default of a joint appointment, then as the ſurvivor ſhould appoint; and, in default of appointment, to be equally divided among the children, if more than one, as tenants in common, with croſs remainders and benefit of ſurvivorſhip; if but one, then to the child in tail; in default of ſuch iſſue, to the huſband, his heirs and aſſigns, for ever.

Upon a queſtion, whether the inheritance in the lands to be purchaſed would have veſted in the father, it was contended it could not; becauſe, during his whole life, the inheritance, ſuppoſing a purchaſe made, would have been in abeyance: for, as he might have limited it to any child in fee, and the proviſion over in default of appointment would then have been out of the queſtion, it was a ſpringing uſe, reſting in ſuſpenſe during his life, for which Lord *Conway*'s caſe was referred to.

But Lord *Hardwicke* held, that, the father taking an eſtate for life by the ſame ſettlement, the inheritance would have veſted in him. He ſaid, that, where no perſon was ſeen or known, in whom the inheritance could veſt, it might be in abeyance; that the fees being in abeyance, had, in ſome caſes, occaſioned an act of parliament to remedy it; but there it was not ſo: nor did the power of appointment make any alteration therein: for the whole effect thereof was, that the fee, which was veſted, was thereby ſubject to be deveſted, if the whole was appointed;

pointed; or, if part, ſo much as was not drawn out of the inheritance ſtill remained in the father, as part of the old fee; and there was no occaſion to put the inheritance in abeyance, which the court never did but from neceſſity; and would ſo mould it by opening the eſtate, as in *Lewis Bowle*'s caſe, and in ſeveral others, as beſt to anſwer the purpoſes of the limitations: but, if the appointment was not made, it remained undiſturbed.

It is to be obſerved, that this was not a caſe, in which the eſtate was originally the father's, or veſted in him at all before the ſettlement; where the limitation of the fee to him, being the reverſion, and part of his old eſtate, would have remained veſted in him, till deveſted by the veſting of a contingent remainder. But it was the caſe of money, to be laid out in lands, where the father's title to the inheritance was to originate in the ſame ſettlement as the limitations to the children; and by which (as Lord *Hardwicke* obſerved), as the father took alſo an eſtate for life, the inheritance, according to the ordinary rules, veſted in him.

§ 36. By marriage ſettlement, lands were limited to the uſe of the wife and her heirs, till the marriage, afterwards to her ſeparate uſe for life; remainder to the uſe of her huſband for life; remainder to the uſe of all and every the child or children of the marriage, or ſuch of them, for ſuch intents and eſtates, &c. and in ſuch parts, ſhares, and proportions, as the huſband and wife ſhould by deed appoint; and, for want of

Doe v. Martin, 4 Term R. 29.

ſuch appointment, then to the uſe of the child or children of the marriage, in ſuch parts, ſhares, and proportions, and for ſuch eſtates and intereſts, as the ſurvivor of them ſhould by deed or will appoint; and, for want of ſuch appointment, then to the uſe of all and every the child or children, equally, ſhare and ſhare alike.

Upon a queſtion, whether the remainders to the children were veſted or contingent, it was contended, that the power of appointment prevented their veſting, by abſorbing the whole fee; and the caſes of *Leonard*, *Lovie*, *Loddington* v. *Kyme*, and Lord *Conway*, were cited in ſupport of this concluſion.

Lord *Kenyon*, after obſerving that the judgment muſt depend on the authorities cited, the three leading of which were, *Lovie*'s caſe, *Walpole* v. Lord *Conway*, and *Cunningham* v. *Moody*, and noticing the opinions in the two laſt, was happy to find, that, in the laſt of theſe caſes (*Cunningham* v. *Moody*), where Lord *Hardwicke* had an opportunity of re-conſidering this queſtion more fully, and at a time of life when his judgment was more mature, he determined differently from the the opinions held in the two former. His lordſhip ſaid, he could not find any ſubſtantial diſtinction between that caſe and the principal one. That the limitations to the children were firſt ſubject to a power of appointment to the children, *&c.*: and, whether the limitations preceded or followed the power of appointment, it made no difference. That the opinion of Lord *Hardwicke* in the latter caſe was peculiarly

peculiarly deſerving of attention; becauſe, when it was diſcuſſed, the former one of *Walpole* v. Lord *Conway*, where he had intimated a different opinion, was ſtrongly preſſed upon him; and becauſe too he decided the laſt caſe at a time when he had the aſſiſtance of ſome of the moſt eminent lawyers that ever attended the bar of that court. Lord *Kenyon* therefore thought, that, on the authority of that caſe, the remainders to the children were veſted, ſubject, nevertheleſs, to be deveſted by the parents executing the power.

Mr. Juſtice *Buller* cited the caſe put by Mr. J. *Powel*, 2 *Ld. Raym.* 1158., of a limitation to ſuch perſons as *A.* ſhould appoint by will, remainder over, in ſupport of the ſame concluſion, and judgment was given accordingly.

TITLE XXXII.

DEED.

CHAP. XVI.

Of the Execution of Powers.

§ 1. *May be reſtrained by Circumſtances.*
10. *Where the particular Inſtrument is ſpecified it muſt be adopted*
12. *A Power given generally, may be executed either by Deed or Will.*
15. *But they muſt be properly executed.*
17. *Exception.*
20. *A Will made in Execution of a Power reſtrains all its Properties.*
23. *The Power need not be recited.*
27. *But the Inſtrument muſt refer to the Eſtate.*
29. *A Power may be executed by ſeveral Inſtruments.*
31. *And at different Times.*
34. *An Appointment may only be a Revocation,* pro tanto.
37. *An Appointment may give a leſſer Eſtate.*
41. *An Appointment muſt not be illuſory.*
48. *A Condition annexed to an Appointment is void.*
50. *An Appointment to Perſons not Objects of the Power is void.*
55. *A Power cannot be delegated.*
57. *Unleſs there are ſpecial Words.*
59. *In what Caſes an Inſtrument operates as an Appointment.*
61. *Effects of the Execution of a Power.*
68. *Will not Defeat a prior Eſtate.*

Section 1.

May be reſtrained by Circumſtances.

POWERS of revocation and appointment were formerly directed to be executed by the tender of a ring, the payment of a ſum of money, &c. But in modern times they have in general been directed to be executed by deed or inſtrument in writing, or by will.

§ 2. The execution of powers of revocation and appointment may be reſtrained by ſuch collateral circumſtances,

cumſtances, and directed to be done by ſuch inſtruments, attended with ſuch forms and ceremonies, as the perſons creating the power may think proper. Nor can a court of law diſpenſe with the performance of thoſe ceremonies without violating the intention of the parties.

This rule is the ſame, though the power be reſerved to the original owner of the eſtate; for where a man debars himſelf from making any future diſpoſition of his property, except by an act attended with certain forms, no court of law can diſpenſe with the obſervance of thoſe forms; becauſe a man may feel conſcious of ſuch weakneſs or frailty of mind, as to require that all future diſpoſitions made by him, ſhould be attended with ſuch forms and ſolemnities, as may effectually prevent ſurpriſe and impoſition. 3 Cha. Ca. 55. 107.

§ 3. It has therefore been eſtabliſhed at law, as a general rule, ever ſince the introduction of powers, that all the forms and circumſtances preſcribed by the deed, by which the power is created, muſt be ſtrictly obſerved; otherwiſe no revocation or new appointment will take place. 10 Rep. 144 *a*.

§ 4. Thus, where the execution of a power of revocation and appointment was directed to be by *deed indented to be inrolled;* it was reſolved, that theſe circumſtances muſt be complied with, for if the deed were allowed to operate as a revocation before inrolment, then it never would be inrolled. It was alſo reſolved in the ſame caſe, that where the deed was Diggs's Caſe, 1 Rep. 173.

directed to be inrolled in a particular court, it muſt be inrolled in that court.

Hawkins v. Kemp, 3 Eaſt. R. 410.

§ 5. A huſband who was tenant for life had a power of revocation, by any deed or inſtrument in writing, to be executed by him in the preſence of and atteſted by three or more credible witneſſes; and to be inrolled in one of his Majeſty's courts of record, at *Weſtminſter*, by and with the conſent and approbation, in writing, of nine perſons, or the ſurvivors or ſurvivor of them, but not otherwiſe.

One of the nine perſons, whoſe conſent was neceſſary, gave a power of attorney to the huſband, authorizing him to conſent to any revocation he ſhould think proper to make, and to execute any deed or inſtrument neceſſary for that purpoſe.

By a deed poll, executed by the huſband in his own character, and alſo as attorney to one of the truſtees under the power mentioned, he revoked the uſes; and this deed was inrolled. Seven years after, the huſband by an indenture, reciting the deed of revocation, and that, it being executed by the huſband as the attorney of one of the perſons whoſe conſent was neceſſary, upon that account doubts were entertained of its validity, as a revocation, revoked the uſes with the conſent of all the parties required; but this deed was not inrolled in the lifetime of the huſband.

The court reſolved, that the firſt deed was not a good revocation; becauſe the conſent of one of the perſons,

perſons, whoſe conſent was neceſſary, was not ſufficiently given by the execution of the deed by the huſband, as his attorney; becauſe, if ſuch a mode of ſignifying a conſent was held ſufficient, it would be a total deſtruction of the check intended, by requiring the perſonal approbation of a third perſon; and that the ſecond deed was not ſufficient, becauſe it was not inrolled; and that the inrolment of the firſt deed could not be transferred to the ſecond, for every thing, required to be done in the execution of ſuch a power, ought to be ſtrictly performed.

§ 6. Where a perſon reſerved to himſelf a power of revocation by any deed or writing, to be executed in the preſence of ſix witneſſes, whereof three ſhould be peers; a will executed before three witneſſes, was held not to be an execution of the power.

§ 7. The Duke of *Albemarle* made his will in 1675, and thereby gave a great part of his eſtate to the Earl of *Bath*. In 1681, he made a deed of ſettlement, whereby, though he varied in ſeveral particulars from his will, yet he limited the greateſt part of his eſtate to Lord *Bath*. In this ſettlement the Duke reſerved to himſelf a power of revocation, by any deed in writing, to be executed by him, in the preſence of ſix or more credible witneſſes, three whereof to be peers of the realm.

Bath & Montague's Caſe, 3 Cha. Ca. 55. 2 Freem. 193.

In 1688, the Duke made another will, atteſted by three witneſſes only, whereby he revoked this ſettlement,

ment, and gave a great part of his eſtate to Mr. *Monk*. Mr. *Monk*, upon the Duke's death, brought a bill in Chancery to ſet aſide the ſettlement, and eſtabliſh the will; and it was inſiſted on his behalf, that although the will might not in ſtrictneſs of law, be a revocation of the deed of ſettlement, the circumſtances required not having been purſued, either in the number or quality of the witneſſes, yet as it was made with great deliberation, it being in proof that the draft was not completed until ſix months after inſtructions had been given for preparing it, and that Lord Chief Juſtice *Pollexfen*'s opinion was taken upon it, it ought to be deemed an effectual revocation in equity, although the circumſtances required had not been ſtrictly purſued; as they were only preſcribed to prevent ſurpriſe, and it was evident there was none in this caſe.

But it was held by Lord Keeper *Somers*, the two Chief Juſtices *Holt* and *Treby*, and Baron *Powell*, that the latter will was no revocation of the former ſettlement, either at law or in equity: for in all caſes of revocations, merely voluntary, all the circumſtances required by the deed creating the power, muſt be ſtrictly purſued; and there was no precedent of any caſe in equity in which the court had given any aid, where both parties were volunteers.

§ 8. Where a power of revocation was given to be executed by will, under hand and ſeal; a will not ſealed was held not to be a revocation.

§ 9. Huſband

§ 9. Huſband and wife ſettled the wife's eſtate to the uſe of themſelves for their lives, remainder to their firſt and other ſons, in tail male; with a power to the huſband at any time during the joint lives of himſelf and his wife—"By his laſt will, or any writ- "ing purporting to be his laſt will, under his hand "and ſeal, atteſted by three or more credible wit- "neſſes (if he ſhould die before his wife without any "iſſue between them then living) to charge the pre- "miſes with any ſum or ſums of money, not exceed- "ing 2000 *l.*, to be paid to ſuch perſons, and in ſuch "proportions as he ſhould appoint." Dormer v. Thurland, 2 P. Wms. 506.

There was no iſſue of the marriage, and the huſband by his laſt will, in writing under his hand, atteſted by three witneſſes, but not ſealed, reciting his power of charging the premiſes with 2000 *l.*, diſpoſed of the ſame among his own relations.

One of the queſtions in this caſe was, whether this will, not being ſealed, was a good appointment of the 2000 *l.*, within the power,

Lord Chancellor *King* was of opinion, that the will being duly executed, was a good appointment: but directed for the ſatisfaction of the parties, as it was a matter of law, that it ſhould be referred to the judges of the King's Bench. And it was by them determined, that the will was void as a charge, for want of being ſealed.

The opinion of the Lord Chancellor, in this caſe, was founded on an idea that the words, *under his*

hand and ſeal, referred only to the ſentence immediately preceding, *viz. or any writing purporting to be his laſt will*, and not to the words, *by his laſt will*, ſo that the power might be executed, either by a will duly atteſted, according to the ſtatute of frauds, which does not require a ſeal, or elſe by a writing purporting to be a will, under his hand and ſeal. But the Court of King's Bench was of opinion, that the words under *hand and ſeal*, referred to both the preceding ſentences. And this conſtruction has been adopted by Lord *Hardwicke* in a ſimilar caſe, reſpecting perſonal property.

Roſs v. Ewer, 2 Atk. 156. Vide Spranger v. Barnard, 2 Bro. Rep. 585.

Where the particular Inſtrument is ſpecified, it muſt be adopted.

§ 10. If the nature of the inſtrument by which a power is directed to be executed, be ſpecified, it muſt be adopted: and therefore a power to revoke by deed, cannot be executed by will.

Darlington v. Pulteney, Cowp. Rep. 260.

§ 11. The Earl of *Bath* and Lord *Pulteney* his eldeſt ſon, joined in ſuffering recoveries, and declared the uſes thereof, to ſuch perſons, as Lord *Bath* and Lord *Pulteney*, by any deed or deeds, ſealed and delivered by them in the preſence of two or more credible witneſſes, ſhould jointly appoint. And in caſe of the death of either of them, then as the ſurvivor of them, by any deed or deeds to be executed as aforeſaid, ſhould appoint. Lord *Bath* having ſurvived his ſon, made his will duly executed, and ſealed, and thereby deviſed a piece of ground compriſed in one of the recoveries. And the queſtion was, whether this will ſhould operate as an execution of the power.

A caſe

A caſe having been ſent by the Court of Chancery to the Court of King's Bench on this point,

Lord *Mansfield* ſaid, the firſt requiſite which the power preſcribed was impoſſible to be performed by will, which was, that it ſhould be by joint deed of Lord *Bath* and his ſon. It was true the ſurvivor had the ſame power, but then it was emphatically reſerved to be executed by deed. Now the word deed, in the underſtanding of the law, had a technical ſignification to which a will was in no reſpect applicable. If any words had been thrown in, ſuch as writing, inſtrument, or other term of a general comprehenſive meaning, it might have been fair to have taken advantage of it, in favour of the intention; but there being no general words, nor any meritorious conſideration, it was impoſſible to ſay, that a will was a deed, within the terms of this power.

The Court of King's Bench certified that the power was not duly executed by this will.

Cavan v. Pulteney, 6 Bro. Par. Ca. 175.

§ 12. Although the courts of law have never deviated from the principle, that all the circumſtances required by the perſon who creates the power, ſhould be ſtrictly purſued; yet in other reſpects, they have proceeded with ſufficient liberality in ſupporting revocations. Thus, if a power be given generally, without any reſtrictions, as to the nature of the inſtrument by which it is to be executed; or if words of a general nature only, ſuch as writing or inſtrument be inſerted, it may in ſuch caſe be executed, either by a deed, or by a will.

A Power given generally may be executed either by Deed or by Will.

§ 13. A perſon

Kibbett v. Lee, Hob. 312.

§ 13. A perſon covenanted to ſtand ſeiſed to the uſe of himſelf for life, remainder to his eldeſt ſon, and the heirs of his body; reſerving to himſelf a power "by writing, under his hand and ſeal, and by "him delivered in the preſence of three credible wit- "neſſes," to revoke the uſes.

Afterwards the covenantor made his will, in writing, under his hand and ſeal, delivered in the preſence of four witneſſes, and thereby deviſed the lands compriſed in the deed of covenant to his youngeſt ſon.

It was reſolved, that this will being a writing, ſigned, ſealed, and delivered in the preſence of three credible witneſſes, was a good revocation and appointment.

Roſcommon v. Fowke, 6 Bro. Parl. Ca. 158.

§ 14. A power was given to a woman, by any writing, under her hand and ſeal, atteſted by two or more credible witneſſes, to revoke certain uſes, and by the ſame or any other deed to limit new ones. She by will, under hand and ſeal, atteſted by three witneſſes, deviſed the lands compriſed in the power.

It was determined by the Court of Common Pleas, in *Ireland*, and by the Houſe of Lords of *England*, that this was a good execution of the power, the word "writing" being applicable to a will.

But they muſt be properly executed, 1 P. Wms. 741.

§ 15. Where a power is given generally to revoke uſes, and appoint new ones; or where a power is expreſsly given by deed or will, without preſcribing the manner in which either of them is to be executed, the inſtrument

inſtrument is intended in law to be ſuch a one as is proper for the diſpoſition of that, which is the ſubject matter of the power. From which it follows, that a deed made in execution of a power muſt be ſealed, and a will muſt be executed according to the ſtatute of frauds and perjuries.

§ 16. Lands were conveyed to truſtees and their heirs, to the uſe of them and their heirs, in truſt (after a ſum of money ſhould be raiſed) to convey them to *J. S.* and his heirs, or to ſuch perſon or perſons, as he or they ſhould appoint. *J. S.* by a will, atteſted by two witneſſes only, deviſed the lands; it was contended that the will ſhould operate as an appointment: the Lord Chancellor, however, decreed that it could not be deemed an appointment, becauſe it was not executed according to the forms preſcribed by the ſtatute of frauds and perjuries. Wagſtaff v. Wagſtaff, 3. P. Wms. 258.

§ 17. But where no intereſt paſſes from the perſon who executes the power, directed to be executed by will, and he is merely to apportion that which another perſon has given; in ſuch a caſe, as he is not the perſon who makes the charge, or affects the eſtate, it is not neceſſary that ſuch a will ſhould be executed according to the ſtatute of frauds. Exception.

§ 18. *Thomas Clough* being tenant for life, under a marriage ſettlement, with remainder to his firſt and other ſons in tail, and having two ſons *John* and *Thomas*, who were of age, they entered into articles, reciting the ſettlement, and that there was no proviſion for Jones v. Clough, 2 Vez. 365.

It was reſolved, that as *Clement Harwood* had not a power of deviſing the third acre under the ſtatute of wills, it being held *in capite*, his will ſhould operate as an appointment under his power, for, otherwiſe, it would have no effect whatever.

Scrope's Caſe, 10 Rep. 143.

§ 25. *Nicholas Scrope* reſerved to himſelf a power of revocation, by writing indented under his hand and ſeal, ſubſcribed in the preſence of three witneſſes; afterwards, he covenanted to ſtand ſeiſed of the ſame lands to other uſes. It was reſolved in the court of wards, by the two Chief Juſtices and the Chief Baron, that although there was no expreſs declaration of any intention to revoke the former uſes, yet that this conveyance ſhould enure, firſt, as a revocation of the former uſes, and ſecondly, as a declaration of new uſes; *quia non refert an quis intentionem ſuam declaret verbis, an rebus ipſis et factis;* and when *Scrope* limited new uſes, he thereby ſignified his purpoſe to revoke the former ones.

Guy v. Dormer, T. Raymond 295.

§ 26. *William Dormer* conveyed his eſtate to truſtees, to certain uſes, with a proviſo, that if he ſhould, by any writing executed in the preſence of two or more witneſſes, in expreſs words, ſignify and declare his intention to revoke or make void that deed, the uſes ſhould ceaſe. *William Dormer* afterwards made his will in writing, ſigned and ſealed in the preſence of two witneſſes, by which he gave and deviſed the lands to different perſons from thoſe to whom they were limited by the deed. It was determined, that the power of revocation was well executed.

Deg v. Deg, 2 P. Wms. 414.

§ 27. The inſtrument by which a power is executed, muſt, however, have ſome reference to, or muſt mention the eſtate on which it is intended to operate, otherwiſe it will not be conſidered as a revocation or appointment. But it will be ſufficient that the eſtate ſubjected to the power, be referred to in terms which include it with the other property of the appointor, although it be not particularized.

But the Inſtrument muſt refer to the Eſtate.

§ 28. A perſon having a power to charge an eſtate with 2,000 *l.* after the death of his wife, and a term of years being created for that purpoſe, he made a will, beginning with theſe words, "I charge all my real "eſtate."

Probert v. Morgan, 1 Atk. 441.

It was held by Lord *Hardwicke*, that if a man had a power to charge an eſtate, it was not neceſſary, in the execution of it, that he ſhould refer to the deed out of which the power aroſe, for, in a court of equity, it was enough that his intent appeared; and if, in the execution, he ſufficiently deſcribed the eſtate he had a power to charge, it would be bound, eſpecially where the perſon charging was a purchaſer of the power: and his Lordſhip held, that the power was well executed.

Vide 1 Atk. 559.

§ 29. Although a power of appointment be directed to be executed by any deed or writing, yet it may be executed by ſeveral acts and aſſurances, provided they have ſuch a relation to each other, that they can be conſidered as making together but one aſſurance.

A Power may be executed by ſeveral Inſtruments.

Herring v. Brown, 2 Show. 185. 1 Vent. 368.

§ 30. Sir *James Williams* being ſeiſed in fee, made a voluntary ſettlement, to the uſe of himſelf for life, remainder to his brother in tail, reſerving to himſelf a power of revocation, by deed indented and ſigned by two or more witneſſes. Some time after, Sir *J. Williams* levied a fine, and, by a deed made between him, his brother, and others, bearing date a month after the fine was levied, reciting the fine, it was declared, that at the time of levying the ſaid fine, the agreement of all the parties was, that it ſhould enure to the uſe of Sir *J. Williams* and his heirs.

2 Burr. R. 704. Doug. Rep. 45.

It was determined in the Exchequer Chamber by ſix Judges againſt two, that this fine and declaration of uſes were to be conſidered as one and the ſame conveyance, and operated as an execution of the power.

And at different Times.

§ 31. Powers of revocation and appointment may be executed at different times, over different parts of the eſtates which are ſubject to the power.

Digge's Caſe, 1 Rep. 173.

§ 32. *Chriſtopher Digges*, in conſideration of his marriage, covenanted to ſtand ſeiſed to the uſe of himſelf for life, remainder to the uſe of his ſon in tail, *&c.* with a proviſo, that it ſhould be lawful for him to revoke any of the uſes or eſtates, and to limit new uſes. *Chriſtopher Digges* revoked the uſes of part of the land, and afterwards revoked the uſes of another part. It was reſolved, that he might revoke part at one time, and part at another, and ſo of the reſidue, until he had revoked all.

Sir R. Lee's Caſe, 1 And. 67. S. P.

§ 33. A power

§ 33. A power was given by will to a perſon, "from "time to time, by deed or deeds, writing or writings, "to limit or appoint to the uſe of any woman or wo- "men, for and in lieu of jointure, all or any part of "the land," &c. The deviſee, on his marriage, appointed part of the premiſes to the uſe of his wife, purſuant to his power.

Zouch v. Woolſton, 2 Burr. R. 1136. 1 Bla. Rep. 281.

Afterwards the deviſee, by another deed, reciting that he had got an additional portion by his wife, in conſideration thereof, and as an additional jointure, appointed another part of the premiſes to the uſe of his wife. The queſtion was, whether the deviſee had not completely exhauſted his power by the firſt appointment, or whether he had ſtill ſufficient power to make the ſecond appointment.

It was unanimouſly reſolved, that the power was not exhauſted by the firſt appointment, and, therefore, that the ſecond appointment was good.

Doe v. Milborne, 2 Term Rep. 721. S. P.

§ 34. An appointment may, in ſome inſtances, have a partial operation, and only operate as a revocation *pro tanto*. Upon this principle, it has been held, that where a perſon having a power of revocation and appointment, mortgages the lands, ſuch mortgage only operates as a revocation *pro tanto*, becauſe, in equity, the mortgagor ſtill continues owner of the eſtate, a mortgage being conſidered as a pledge only for the money.

An Appointment may only be a revocation *pro tanto*.

Perkins v. Walker, 1 Vern. 97. Id. 141. 182.

§ 35. But where a mortgage is made by the execution of a power, and there is alſo a complete diſpoſi-

tion of the equity of redemption, there the revocation will be complete.

Fitzgerald v. Fauconberg, Fitzg. Rep. 207. 6 Bro. Parl. Ca. 295.

§ 36. A perſon who had a power of revocation and appointment, conveyed the eſtate to truſtees and their heirs, upon truſt out of the rents and profits of the premiſes, or by mortgage, *&c.* to raiſe ſo much money as ſhould be ſufficient to pay all the debts mentioned in a ſchedule thereunto annexed, and, after payment thereof, that they ſhould pay the overplus (if any) and reconvey ſuch part of the premiſes as ſhould remain unſold, to the grantor, or to ſuch perſons, uſes, and eſtates, as he ſhould appoint.

It was determined, that this deed operated as a complete revocation of the uſes, and not as a revocation *pro tanto*.

An Appointment may give a leſſer Eſtate.

§ 37. The execution of a power will be good, although it limits a leſſer eſtate than that which the appointor was enabled to limit.

Rattle v. Popham, 2 Stra. 992. 2 Burr. 1147.

§ 38. A tenant for life having a power to limit the lands to any woman he ſhould marry, for her life, by way of jointure, and in bar of dower, made a leaſe for 99 years, determinable on the death of his wife, by way of a jointure for her.

It was held, on a ſpecial verdict in ejectment, that this was not a good execution of the power at law, for the eſtates were totally different, one being a freehold, the other a chattel.

But

But Lord Chancellor *Talbot* held it to be warranted by the power, ſaying, that it was not a defective, but a blundering execution of the power. 2 Veſey 644.

§ 39. *J. S.* having four children, two ſons and two daughters, ſettled his eſtate to the uſe of himſelf for life, remainder to his wife for life, and, after their deceaſe, to the uſe of ſuch child and children, and in ſuch ſhares and proportions as he ſhould appoint. *J. S.*, by his will, deviſed a rent-charge out of thoſe lands to his youngeſt ſon for life, remainder to the firſt and other ſons of his body; and if he died without iſſue, ſo as the eſtate ſhould come to his eldeſt ſon, then he to pay 500 *l.* a piece to his daughters. The eldeſt ſon inſiſted, that the power was not well purſued, as the teſtator might have diſtributed the lands among his children, but had not power to deviſe a rent-charge, or ſums of money. But the court held the appointment to be good. Thwaytes v. Dye, 2 Vern. 80 Vide Roberts v. Dixall, 2 Ab. Eq. 668.

§ 40. In a modern caſe, it was held, that a power of appointing a real eſtate, was well executed by a deviſe to truſtees to ſell, and an appointment of the money to ariſe from the ſale. Kenworthy v. Bate, 6 Veſ. Jun. 792. Long v. Long, 5 Veſ. Jun. 445.

§ 41. Where a perſon has a power of appointing an eſtate, or a ſum of money, *unto and among* his children, in ſuch ſhares and proportions as he ſhall think proper; the appointor muſt give the whole among the children, and every child muſt have ſuch a fair and reaſonable ſhare as is not illuſory. An Appointment muſt not be illuſory. Pawlet v. Pawlet, 1 Wilſ. R. 224.

Menzey v. Walker, Forreſt 72.

§ 42. The truſt of a term of 300 years was declared to be for raiſing ſuch ſums of money for the portions of the children of a marriage (except an eldeſt or only ſon) in ſuch manner, and at ſuch time, and under ſuch limitations, as the huſband ſhould by will or deed appoint, ſo as ſuch ſum or ſums did not, in the whole, amount to above 2,000 *l.* There were three younger children, and the huſband by his will, reciting that his two daughters were amply provided for by their grandfather, appointed the whole of the ſum to his ſecond ſon.

It was decreed, that the execution of the power was void.

Pocklinton v. Bayne, 1 Bro. Ca. in Chan. 450.

§ 43. Lands were limited "to *Samuel Pocklinton* "for life, remainder to his wife for life, remainder to "the uſe of all and every the child and children of the "ſaid *S. P.*, *&c.* in ſuch parts, ſhares, and proportions, and for ſuch eſtate and eſtates, not exceeding "an eſtate or eſtates tail, with or without power of "revocation, and by, with, and under ſuch powers, "proviſoes, remainders, or limitations, over to ſome "or one of the ſaid children, as the ſaid *S. P.* ſhould "by any deed or writing, or by will, direct or appoint; and for default of ſuch appointment, then "to all and every the children, to be divided ſhare "and ſhare alike."

S. P., by will duly atteſted, reciting the power, did, in purſuance thereof, limit one acre of the premiſes to his eldeſt ſon, and his daughter, for their lives, and the

the life of the ſurvivor of them, with remainder to ſuch perſon or perſons as ſhould be entitled to the reſidue of the ſaid premiſes, and then limited the reſidue to his ſecond ſon *Henry*, in ſtrict ſettlement.

Lord *Thurlow* was clearly of opinion, that the execution of the power was totally illuſory, and contrary to its nature; that, therefore, the eſtate muſt go among all the children, agreeable to the direction, in default of execution of the power.

§ 44. If, however, it appears from the words of the power, to have been the intention of the parties, that the donee ſhould give the whole of the property to any one of the children, or perſons intended to be benefited, an appointment to one will be good.

Thomas v. Thomas, 2 Vern. 513.

§ 45. The truſt of a term was declared, that if *Robert Auſtin* ſhould die leaving iſſue by his wife, a ſon and other children, then to raiſe a ſum not exceeding 1,500 *l.* for the ſole benefit and advantage of ſuch child or children, (other than the eldeſt), in ſuch proportions, manner, and form, in all reſpects, as the ſaid *R. A.* ſhould for ſuch purpoſe, by his laſt will in writing direct, limit, or appoint; and in default of ſuch direction, then to the ſole benefit of ſuch child, if but one, and if more, (other than an eldeſt), to them all equally.

Auſtin v. Auſtin, 2 Ab. Eq. 667.

R. A., by his will, directed the money to be raiſed, and appointed 450 *l.* to *Robert*, one of the younger ſons, and 1,050 *l.* to his daughter; but gave nothing

to

to *Edward*, another younger ſon, who brought his bill to be let in to a ſhare of the 1,500 *l.* But it appearing that he was otherwiſe provided for, and becauſe there was a diſcretionary power in the father, which he had exerciſed in a reaſonable manner, the bill, after long conſideration, was diſmiſſed.

Swift v. Gregſon, 1 Term R. 432.

§ 46. Lands were limited in a marriage ſettlement, to the uſe of *John Gregson* for life, remainder "to and "for the uſe and behoof of ſuch child and children "of the ſaid *J. G.*, *&c.* and for ſuch eſtate and eſtates, "intents and purpoſes, as the ſaid *J. G.* ſhould ap-"point, and, for want of ſuch appointment, to the "uſe of all and every the child and children of the "ſaid *J. G.*, *&c.* equally, ſhare and ſhare alike."

John Gregson, by deed reciting the ſettlement, and that he had two children, *Rain Gregson* and *Mary Huntley*, appointed, that the premiſes ſhould, after his deceaſe, go to the uſe of the ſaid *Rain Gregson* and the heirs of his body, remainder to the ſaid *Mary Huntley* and her heirs. *Mary Huntley* brought an ejectment for the recovery of an undivided moiety of the eſtate, upon the ground, that the appointment was illuſive and void.

Mr. Juſtice *Buller* ſaid, the words of the power were, "to and for the uſe and behoof of ſuch child and "children, and for ſuch eſtate and eſtates," *&c.* The argument for the plaintiff was, firſt, that where there is a power to give an eſtate, to and amongſt all and every the children, each muſt have a beneficial part; and,

and, ſecondly, that theſe words were tantamount to thoſe.

His objection was to the minor propoſition; theſe words were not like thoſe aſſumed; there were no ſuch words in this power, as, "to and amongſt," but juſt the reverſe, for it was a power to appoint to the uſe and behoof of ſuch child and children; therefore, inſtead of including all, it ſays, that the appointor may appoint to one only.

The plaintiff's counſel admitted, that, under a power of appointing *to ſuch of my children*, an appointment to one only would be good, but the preſent words were ſtronger. An appointment to one, under a power of appointing *to ſuch child and children*, was good, becauſe it includes one. He cited the caſe of *Spring* v. *Biles*, *Mich.* 24 *Geo.* 3. *B. R.*, where a power was given to diſpoſe of lands, "to and amongſt ſuch of "my relations as ſhall be living at the time of my de-"ceaſe, in ſuch parts, ſhares, and proportions, as my "wife ſhall think proper." And it was determined, that an appointment of the whole eſtate to one of the relations was good.

He obſerved, that that caſe, with the difference only of *relations* inſtead of *children*, was ſtronger than the preſent. There the power was, "to and amongſt ſuch "of my relations, &c. in ſuch parts, ſhares, and pro-"portions," &c. which imported that a diviſion was intended: but, in the preſent caſe, the words "parts, "ſhares, and proportions," were not uſed, and there

was

was no evidence of an intention that it ſhould be divided into ſhares. In that caſe, the court ſaid, they had not a particle of doubt, but that the word *ſuch* meant one or more. Here, therefore, it muſt have the ſame conſtruction. It muſt mean, that the appointor ſhould appoint to one or more.

Kenworthy v. Bate, 6 Veſ. Jun. 793.

Judgment for the defendant.

§ 47. It has been determined in ſome modern caſes reſpecting perſonal property, that an illuſory appointment may be accounted for by circumſtances; and, therefore, where a perſon having a power of appointment among his children, and having advanced one of his daughters in marriage, recited that as a reaſon for giving her a ſmall ſhare. It was held not to be illuſory.

1 Veſ. Jun. 299. 2 Veſ. 336.

In a ſubſequent caſe, it was ſaid, that, in equity, an appointment of a very ſmall ſhare was not illuſory, if juſtified by circumſtances; as, where that object was otherwiſe provided for.

4 Veſ. Jun. 785. Vide 5 Veſ. Jun. 859.

§ 48. A condition annexed to an appointment, where the power does not warrant ſuch condition, will be deemed void. So that, if a father, having a power to appoint a ſum of money among his children, qualifies his appointment to one of them, with a condition, that he ſhall releaſe a debt or pay a ſum of money, the appointment will be abſolute, and the condition void.

A Condition annexed to an Appointment is void. 2 Veſey 644. Pawlet v. Pawlet, 1 Wilſ. R. 224.

§ 49. The

§ 49. The principle upon which this doctrine is founded, is, that where there is a complete execution of a power, and ſomething *ex abundanti* is added, which is not warranted by the power, there, if the exceſs be diſtinguiſhable, ſo that the court can draw a line, the execution will be good, and the exceſs only will be void. But if the boundary between the execution and the exceſs cannot be aſcertained, the execution will then be void for the whole.

An Appointment to Perſons not Objects of the Power, is void. Goodtitle v. Weal, 2 Wilſ. R. 369. Alexander v. Alexander, 2 Veſey 640.

§ 50. An appointment to perſons who are not objects of the power, will be void as to thoſe perſons, but good as to thoſe who are objects of the power.

§ 51. *James Alexander* gave by his will 6000 *l.* to two truſtees, upon truſt to pay the intereſt and produce to his wife for life; and gave unto his ſaid wife the abſolute diſpoſal of the ſaid ſum of 6000 *l.* unto and amongſt ſuch children begotten between them, and in ſuch proportions, as ſhe ſhould by her laſt will and teſtament, or by any deed or deeds, *&c.* direct, limit, or appoint.

The mother, by her will, appointed part of the money to two of her children, but in truſt to pay the intereſt thereof to their ſiſter *Catherine* for her life, and, after her death, to pay the principal to the children of *Catherine*.

It was held by Sir *Thomas Clarke*, that the proviſion made for *Catherine* was good, but that the appoinment to the children of *Catherine* was void, becauſe a power

to

to appoint to children, would, in no caſe, warrant an appointment to grandchildren.

Adams v. Adams, Cowp. Rep. 651.

§ 52. Lands were limited to *Shute Adams* for life, remainder to *Frances Adams* his wife for life, remainder to the uſe of ſuch child or children of the ſaid *Shute Adams* and *Frances* his wife, and for ſuch eſtate and eſtates as they ſhould jointly, or as the ſurvivor, in caſe of no joint appointment, ſhould by deed or writing, direct or appoint; and, for want of ſuch direction or appointment, to the uſe of the firſt and every other ſon of the ſaid *Shute Adams* and *Frances* his wife, ſeverally and ſucceſſively, in tail. *Frances Adams* ſurvived her huſband, and, by deed, reciting her power, appointed the premiſes to the uſe of *Mary Shute Adams* her eldeſt ſurviving daughter, for life, remainder to truſtees and their heirs to preſerve contingent remainders, remainder to the firſt and other ſons of the ſaid *Mary Shute Adams* in tail male, remainder to her daughters in tail general, remainder to *Catherine Adams* (the other daughter of *Frances*) for life, remainder to truſtees to preſerve contingent remainders, remainder to her ſons and daughters in the ſame manner, remainder to the uſe of the right heirs of the ſaid *Frances* for ever. *Frances Adams* died, leaving the ſaid two daughters and one ſon.

This caſe being referred by the Court of Chancery to the Court of King's Bench, that court certified their opinion, that, though *Frances Adams* had exceeded her power, which was confined to child or children, by limiting eſtates to her grandchildren, yet they thought the

the ſame ought to prevail, ſo far as her power extended, and that the limitations to her daughters for life were good, but that the diſpoſition of the inheritance to the child or children was void. They were, therefore, of opinion, that there was no appointment of the inheritance of the premiſes; that the ſon took an eſtate tail therein, ſubject to the eſtate for life, to his ſiſters.

§ 53. Lady *Burlington* deviſed all her real eſtates to truſtees to the uſe of her ſon-in-law, the Marquis of *Hartington*, for life, and, after his deceaſe, to the uſe and behoof of ſuch of his child or children, by *Charlotte* Lady *Cavendiſh*, his late wife, for ſuch eſtate and eſtates, and in ſuch ſhares and proportions, and under and ſubject to ſuch powers, proviſoes, conditions, reſtrictions, or limitations, as he ſhould, by deed or will, nominate, direct, or appoint; and in default of ſuch nomination, to the uſe of all and every the child and children of the ſaid Marquis of *Hartington* by his ſaid wife, equally to be divided between them as tenants in common, and of the ſeveral heirs of their bodies.

Doe v. Lord G. Cavendiſh, 4 Term Rep. 741.

The Marquis of *Hartington* (being Duke of *Devonſhire*) made his will, by which he gave all the eſtates which he had power to diſpoſe of, under Lady *Burlington*'s will, to his two younger ſons, *Richard* and *George Cavendiſh*, for life, with remainder to their firſt and other ſons in tail male, with remainder to his eldeſt ſon in fee.

Upon

Upon a caſe reſerved in ejectment, the queſtion was, whether the Duke's will was a good execution of the power given him by Lady *Burlington*, to any, and what extent.

Lord *Mansfield* delivered the opinion of the court. The firſt queſtion determined, was, that the plaintiff's deriving great benefit under the Duke's will, were bound to acquieſce in his diſpoſitions throughout. 2d, That the appointment was good to Lord *George* for life, and, therefore, the ejectment was premature. 3d, The court was of opinion, that the appointment to the children of Lord *George* was good. But, as to this laſt point, the opinion of the court, which was extrajudicial, ſeems to be contradicted by the following caſes.

Vide Fearne Ex. Dev. 4th Edit. 349.

§ 54. By ſettlement on the marriage of *James Dunn* and *Dorothy Wright*, certain eſtates were conveyed to the uſe of *James Dunn* for life, remainder to the uſe of truſtees, in truſt for ſuch child or children of the ſaid *James Dunn* and *Dorothy Wright*, and for ſuch eſtates, and in ſuch proportions, as the ſaid *James Dunn* ſhould by deed or will appoint; and in default of ſuch appointment, in truſt for the firſt and other ſons of the ſaid *James Dunn* by the ſaid *Dorothy*, in tail male; and in default of ſuch iſſue, in truſt to raiſe portions for daughters, *&c.*

Robinſon v. Hardcaſtle, 2 Term Rep. 241. 2 Bro. Rep. 22. 344.

James Dunn having by the ſaid *Dorothy* one ſon and four daughters, deviſed part of the eſtates, namely, the eſtate of *Great Chilton* and *Dalton Percy*, charged with

with his debts and two annuities, to two of his daughters, to the uſe of his ſon *James Dunn* for life, remainder to the firſt and other ſons of the ſaid *James Dunn* the ſon, in tail general, remainder to his daughters in tail, as tenants in common, remainder as to that part of his eſtate at *Great Chilton*, which lay on the eaſt ſide of the road, to one of his daughters in fee; and as to the part which lay on the weſt ſide, to another daughter in fee. Upon the death of *James Dunn* the father, his ſon entered on the eſtates deviſed to him, and having ſuffered a recovery of them, to the uſe of himſelf in fee, he diſpoſed of them by his will, and died without iſſue.

An ejectment was brought by the two ſiſters, to whom *James Dunn* had appointed the premiſes, on failure of iſſue of the ſon of his ſon; and upon a caſe ſent out of the Court of Chancery to the Court of King's Bench, that court was of opinion, that the appointment to the ſons of *James Dunn* the ſon was void.

Griffith v. Harriſon, 3 Bro. Rep. 410.

§ 55. A power of revocation and appointment cannot be delegated to another, whether the power relates to the land, or is collateral to it, it being a principle of law, that *delegatus non poteſt delegare.*

A Power cannot be delegated.

§ 56. A huſband by his marriage articles and ſettlement, had a power of diſpoſing, by deed or will, of a reverſionary intereſt, to the iſſue of the marriage, in ſuch proportions as he ſhould think fit. The huſband, by his will, reciting the power, delegated it to

Ingram v. Ingram, 2 Atk. 83.

his wife, that ſhe might diſpoſe of the eſtate among the children, in ſuch proportions as ſhe ſhould think proper.

Lord *Hardwicke* ſaid, this muſt be conſidered as a power of attorney, which could only be executed by the huſband, to whom it was confined, and was not in its nature tranſmiſſible to a third perſon.

Unleſs there are ſpecial Words.

§ 57. But if a power be expreſsly reſerved to be executed by a perſon and his aſſigns, an execution by an aſſignee will, in ſuch caſe, be good; and a deviſee will be a good aſſignee, within the words of ſuch a power.

How v. Whitfield, 1 Vent. 338. 2 Show. 57. 3 Freem. 476.

§ 58. A fine was levied of certain lands, to the uſe of *T.* for life, remainder to *J.* his ſon and the heirs male of his body, remainder to *X* his executors and aſſigns, for eighty years, and that he and his aſſigns of the ſaid term ſhould have full power and authority, to demiſe, *&c.* for twenty-one years or three lives, rendering the ancient rent. *T.* the ſon deviſed this term, and died without iſſue male. The deviſee entered, made his executors, and died. The executor aſſigned over the term, with power to make leaſes, and the queſtion was, whether the power annexed to the term for eighty years was transferable with the term to aſſignees in law. The court was of opinion, that the power was well transferred, and had been good, if reſerved to a ſtranger. But here it was annexed to an intereſt and not merely collateral, and the aſſignees might execute it. The court

alſo conceived, that aſſignees included aſſignees in law as well as in fact, but that the tenant in tail, having deviſed the term, the deviſee was an aſſignee, and the power, in the greateſt ſtrictneſs of acceptation, was in *fieri*, and conſequently muſt go to his executors, and by the ſame reaſon to their aſſignee.

In what Caſes an Inſtrument operates as an Appointment, 6 Rep. 18 *a.* Cro. Eliz. 877. Cro. Jac. 31. Hob. 160.

§ 59. An inſtrument may in ſome caſes take effect, either as an appointment of the uſe, or as a common law conveyance; and in *Clere's* caſe it was determined, that where a feoffment was made to the uſe of ſuch perſon and perſons as the feoffor ſhould appoint, and until appointment, to the uſe of himſelf and his heirs; if in ſuch a caſe the feoffor deviſed the land by will (having a power to deviſe it) as owner, without any reference to his power, it would paſs as a deviſe, by the will; and not as appointed, under the power. For the teſtator had an eſtate deviſable in him, and alſo a power to limit a uſe, and he had his election to purſue whichever of them he choſe; ſo that when he deviſed the land itſelf, without any reference to his power, he ſhewed his intention to paſs the eſtate by his will, as owner of the land, and not to limit a uſe under his power.

Croſs v. Hudſon, ch. 20.

Cox v. Chamberlain, 4 Veſ. Jun. 631.

§ 60. By the ſettlement, made on the marriage of *Thomas* and *Elizabeth Cox* in 1777, a power of revoking the uſes of the ſettlement, with the conſent of the truſtees, was given to *Cox* and his wife, ſo as before ſuch revocation they ſhould convey and aſſure other lands, of equal or better value, in lieu thereof, to the ſame uſes. By indentures of leaſe and releaſe,

dated in 1784, a capital meſſuage and other premiſes were conveyed to a truſtee and his heirs, to hold to him and his heirs, to the uſe of ſuch perſon or perſons, and for ſuch eſtate or eſtates, intereſt or intereſts, and with, under, and ſubject to ſuch powers, proviſoes, and agreements, as *Thomas Cox* ſhould, by deed or writing under his hand and ſeal, limit and appoint; and, in default thereof, to the uſe of the ſaid *Thomas Cox*, his heirs and aſſigns. In 1792, *Thomas Cox* entered into a contract to ſell the eſtates, compriſed in the ſettlement of 1777.

By indentures of leaſe and releaſe, dated in 1792, *Thomas Cox*, in purſuance of all powers in him veſted, did, with the conſent of the ſurviving truſtees in the marriage ſettlement, grant, bargain, ſell, alien, releaſe and confirm, limit, declare, and appoint, and the ſaid *Thomas Cox* and his wife did, with the like conſent and approbation, convey and aſſure to the ſaid ſurviving truſtees and their heirs and aſſigns, the ſaid capital meſſuage, compriſed in the indentures of 1784, to hold to them, their heirs and aſſigns, to and for the ſame uſes, truſts, intents and purpoſes, as were declared in the ſettlement of 1777.

Thomas Cox and his wife revoked the uſes of the ſettlement.

Some doubts having been thrown upon the title, with reſpect to the value of the ſubſtituted eſtates, and alſo upon the ſuppoſition, that the indenture of *Auguſt* 1792, was intended to operate as an execution of a power,

power, and therefore it was doubtful whether the legal eſtate did not veſt in the truſtees, in which caſe the uſes declared thereon would be void at law, and would be good only as truſts in equity, the purchaſer declined to complete the contract; upon which a bill was filed againſt him for a ſpecific performance: and the uſual decree was made, referring it to the Maſter to enquire whether a good title could be made. Infra ſ. 65.

The Maſter reported, that the ſubſtituted eſtates were of greater value than the eſtates compriſed in the marriage ſettlement; and that the plaintiff could make a good title to the eſtates, compriſed in the agreement.

Exceptions were taken to this report: and in ſupport of them it was obſerved, that *Thomas Cox*, in the releaſe of 1792, uſed words applying to the conveyance of an eſtate in fee ſimple, and alſo to the execution of a power of appointment; ſuch an union was very unapt and improper; but the inſtrument, though inaccurate, amounted to a complete execution of the power: then the other words, importing the conveyance of an intereſt, were completely inoperative. Conſidering it then as the execution of a power, the neceſſary effect of it was, to veſt the legal eſtate in truſtees, and then the objection aroſe; the eſtates of the perſons beneficially intereſted being merely equitable; in which reſpect there was a material deviation from the ſettlement, which veſted the legal eſtate in the perſons beneficially intereſted.

In anſwer to this objection it was ſaid, that the only queſtion was, whether the deeds of 1792 operated as a conveyance by leaſe and releaſe, or as the execution of a power? The whole objection reſted upon this, that it muſt operate as the latter: but, where a man has an intereſt and alſo a power, and does an act which may be either a conveyance of the intereſt, or the execution of a power, it ſhall be referred to his intereſt and not to his power. Sir *Edward Clere's* caſe was an authority expreſsly to that point. This was a conveyance to the uſes of the marriage ſettlement, and that conveyed the legal eſtate to the *ceſtuis que uſe*. The inſtrument was certainly more proper for the conveyance of an intereſt, than for the execution of a power: the words of appointment were thrown in generally by the conveyancer, and were quite ſuperfluous. The party had no intention of executing the power: the court always makes the deed operate according to the intention, if by law it may. The intention was declared to be, to veſt the eſtate in the truſtees to the uſes of the marriage ſettlement: there was no room, therefore, for the preſumption, that the intention was merely to execute the power, not to convey an intereſt; that preſumption was in oppoſition to the deed, which goes to declare, that the eſtate veſted in them, and was to enure to the uſes of the ſettlement; it did not begin with words of appointment, but with thoſe importing conveyance. The order, in which the words appeared, concurred with the form of the inſtrument to ſhew, that the firſt words in order were intended to be the operative words: he threw in the words of appointment, if neceſſary,

Ante f. 59.

neceſſary, meaning to make uſe of all the powers that were in him. The deed did not recite the power particularly, but was in purſuance of all powers. There was conſiderable doubt, whether the power was not merged in the intereſt he had, upon the authority of the late caſe of *Goodill* v. *Brigham*. But, if the legal eſtate was veſted in truſtees, yet the proviſo in the ſettlement was ſubſtantially complied with: for the eſtates were in equity in the perſons entitled under the ſettlement; and they could come into Chancery for the legal eſtate, whenever they thought fit.

Ante ch. 15.

Maſter of the Rolls.—The plaintiff, having entered into this contract, has conveyed the ſubſtituted eſtates by the deeds of 1792, in purſuance of all powers in him veſted, and containing words both of conveyance and of appointment. This was preparatory to the revocation of the uſes of the ſettlement, and to enable the plaintiff and his wife to revoke them under the power. The queſtion is, whether under this deed there is a good execution of the condition in the proviſo; or, in other words, whether by the deeds, the plaintiff had legally conveyed to the truſtees in the ſettlement, this other eſtate, exactly in the ſame manner, and to the ſame uſes, as the eſtate compriſed in the ſettlement. The objection is entirely technical, and certainly very nice, and I think a little too refined; though an objection of that ſort certainly may be fairly made; and I will not find fault with a purchaſer for taking the opinion of the court upon it, if gentlemen of great character really ſtate it as a fair ground of objection. The objection ariſes from the

mode, in which the eſtate ſubſtituted was conveyed to the plaintiff; which was, to the uſe of ſuch perſon or perſons, and for ſuch eſtate or eſtates, intereſt or intereſts, and with, under, and ſubject to, ſuch powers, proviſoes, and agreements, as he ſhould, by deed or writing under his hand and ſeal, limit, declare, or appoint, and, in default thereof, to the uſe of him, his heirs and aſſigns. This therefore was veſted in him at the time of the ſubſtitution; and the mode which he takes for that purpoſe is; not by expreſsly declaring that in purſuance of the power he appoints, but by this conveyance of leaſe and releaſe, in which he uſes words that cannot at all apply to the power: and, as he had both a power and an intereſt, it is now ſaid, to invalidate the deed, the court muſt ſay, he did this in execution of his power only, and not to convey his intereſt; that it muſt be referred only to the power, though the truſtees are in poſſeſſion by virtue of the leaſe, which was perfectly nugatory if he meant only to execute his power. That is going out of the way to raiſe objections, which the court is in the habit of very much diſcouraging. I will not determine, whether it would not have been a fatal objection, if it had been an execution of the power, veſting a truſt eſtate inſtead of the legal eſtate under the ſettlement. Unqueſtionably it would be ſo at law.

I ſhall not enter into the queſtion, whether upon the caſe of *Goodill* v. *Brigham*, the power could not be exerciſed. I think, notwithſtanding that it have appointed a uſe under the power; for

for I do not conceive the Judges meant to decide, that where there is a conveyance to ſuch uſes as a man ſhall appoint, and, in default of appointment, to his own right heirs, the party may not under the power create an eſtate that will ſuperſede the eſtate in fee, though perhaps not to bar dower. If that caſe is taken in the full extent, it is very doubtful, and would ſet aſide half the conveyances in the kingdom, and I deſire to be underſtood, that is not my opinion. But I do not by any means go upon that ground. I will ſuppoſe he had the power; but he alſo had an intereſt. The very reſpectable opinions, upon which this objection has been taken, only ſtate it as a doubt; and they are oppoſed by the opinion of another gentleman in favour of the title. But I muſt determine upon the caſe, as it appears upon conſideration of the conveyance; and I am clearly of opinion, upon every principle upon which the court acts with regard to the conſtruction of conveyances, that it would be monſtrous in this caſe to hold, that where there is a power and an intereſt, and the act being equivocal, it is doubtful whether he acted under the one or the other, the court ſhould adopt that, which would defeat the inſtrument. But this caſe goes farther: for the act is not equivocal. The party has made uſe of words, that have no reference to the execution of a power. I am of opinion, therefore, that this is an exceedingly good title.

§ 61. With reſpect to the effects attending the execution of a power, it has been already ſtated, that when a power is executed, the former uſes and eſtates ceaſe,

Effects of the Execution of a Power.

ceaſe, and a new uſe ſprings up to the appointee, which is derived from the ſeiſin or *ſcintilla juris* of the releaſees or truſtees, and the ſtatute immediately executes the poſſeſſion to ſuch new uſes, by which means the appointee acquires the legal eſtate, without entry or claim.

1 Inſt. 376 *b.* n. 1. 2 Atk. 565.

§ 62. Although eſtates which ariſe from the execution of powers owe their commencement to the deed of appointment, yet the appointee under a power does not derive his title from the appointor, or out of the eſtate whereof the appointor is ſeiſed, but comes in directly under the original conveyance, by which the power was created, and the uſes declared by the appointment, being in order prior to the uſes limited by the original deed; which only take place in the mean time, and until the appointment, ſuch new uſes precede them, and the appointment operates by relation, from the time when the original deed was executed, juſt as if the eſtate created by the appointment had been actually limited in the original conveyance.

§ 63. In the caſe of the Duke of *Marlborough* v. Lord *Godolphin*, which aroſe upon an appointment of perſonal eſtate, Lord *Hardwicke* ſaid—"I admit the "principle, that where a perſon takes by execution "of a power, whether of reality or perſonalty, it is "taken under the authority of that power: but not "from the time of the creation of that power. "There is no caſe that the relation ſhall go back for "that, which is quite of another nature: and that is

2 Veſ. 78.

"the

" the point, which muſt be contended for here, that " they muſt take by relation, ſo as to make them " take from the time of the creation of the power; " for which there is no authority: and that would be " unreaſonable. The meaning that the perſons muſt " take under the power, or as if their names had " been inſerted in the power, is, that they ſhall take " in the ſame manner as if the power and inſtrument " executing the power had been incorporated in one " inſtrument; then they ſhall take, as if all that " was in the inſtrument executing, had been expreſſed " in that giving the power. So is it in appointments " of uſes. If a feoffment is executed to ſuch uſes, " as he ſhall appoint by will, when the will is made, " it is clear, that the appointee, *ceſtui que uſe*, is in " by the feoffment; but has nothing from the time of " the execution of the feoffment, ſo as to veſt the " eſtate in him. The eſtate will veſt in him accord- " ing to the nature of the act done, and appoint- " ment of the uſe, from the time of the teſtator's " death. This, therefore, is not a relation, ſo as to " make things veſt from the time of the power, but " according to the time of that act executing that " power; not like the referring back in caſe of " aſſignment in commiſſion of bankruptcy: that is, " by force of the ſtatute, and to avoid *meſne* wrong- " ful acts. The caſe was put of a bargain and ſale; " which was ſaid to be like this of a will, or inſtru- " ment in nature of a will. A bargain and ſale, " when acknowledged and enrolled, has relation to " the time of execution; and if the grantee dies " within ſix months, and afterwards it is acknow-

" ledged

" ledged and inrolled, it is good; that is, becauſe it " is a collateral act acquired by act of parliament, " and not ariſing from the nature of the inſtrument " itſelf."

1 Inſt. 216 *a.* *n.* 2.

§ 64. Where an eſtate is limited to ſuch uſes as *A. B.* ſhall appoint, and in the mean time, and until appointment to the uſe of the ſaid *A. B.* and his heirs; if *A. B.* happens to be married at the time when ſuch conveyance is made, his wife becomes entitled to dower. But if *A. B.* executes his power of appointment, a new uſe ariſes, and veſts in the appointee, and the fee ſimple originally limited to *A. B.* ceaſes, by which means, it is ſuppoſed that his wife's right to dower will alſo ceaſe.

1 Inſt. 379 *b.* *n.* 1. Vide 4 Veſ. Jun. 637.

§ 65. An appointment in purſuance of a power operates under the ſtatute of uſes, not as a conveyance of the land, but as a ſubſtitution of a new uſe, in the place of a former one; and a uſe appointed under a power takes effect in the ſame manner as if it had been inſerted in the original deed, in the place of the power. From which it follows, that if an appointment is made under a power to *A.* to the uſe of *B.* and his heirs, it is a limitation of a uſe upon a uſe; and conſequently *B.* only takes a truſt eſtate. It is therefore the practice, where an appointment is made to particular uſes, to appoint the lands not to truſtees to uſes, as in the caſe of a releaſe, but to the particular uſes intended.

Tit. 12. c. 1. f. 11.

§ 66. Where

§ 66. Where a perſon ſettles his eſtate to the uſe of himſelf for life, remainder over, reſerving to himſelf a power of revocation, and executes his power, he becomes immediately ſeiſed of his former eſtate, without any entry or claim; becauſe, as he is already in poſſeſſion, he cannot enter on himſelf, and the revocation is ſtronger than any claim can be.

1 Inſt. 218 *b.* 1 Rep. 174 *a.*

§ 67. It was reſolved in *Digge's* caſe, that other uſes might be limited or raiſed by the ſame conveyance, which revoked the former uſes, for inaſmuch as the ancient uſes ceaſe *ipſo facto* by the revocation, without claim or other act, the law will adjudge priority of the operation of one and the ſame deed, although it be ſealed and delivered at one and the ſame inſtant; and therefore in conſtruction of law, it ſhall firſt be a revocation, and a ceſſer of the ancient uſes, and then a limitation or raiſing of the new ones; for the beſt conſtruction of the ſtatute of uſes was to make them ſubject to the rules of the common law, according to which, if two acts were done by one and the ſame means, and took place in one and the ſame inſtant, the law would ſo conſtrue them, that that act ſhould be taken to precede, which would give efficacy to the entire inſtrument.

1 Rep. 174 *a.* 6 Rep. 33 *a.*

§ 68. The execution of a power will not defeat an eſtate previouſly created, by the perſon who executes it.

Will not defeat a Prior Eſtate.

§ 69. An eſtate was ſettled, in conſideration of marriage, to *A.* for life, *&c.* and a power was given to

Goodright v. Cator, Doug. 477.

to *A.*, with the conſent of the truſtees, to revoke all the uſes. *A.* conveyed away his life eſtate, for ſecuring an annuity, to a perſon for ninety-nine years, if he ſhould ſo long live, and afterwards, with the conſent of the truſtees, revoked all the uſes of the ſettlement. It was held that this revocation did not affect the eſtate granted for ſecuring the annuity.

TITLE XXXII.

DEED.

CHAP. XVII.

Of Powers to Jointure.

§ 1. *Origin of.*
2. *Conſtruction of the Words— not exceeding the clear yearly Value.*
§ 6. *Power to limit a Jointure proportioned to the Wife's Fortune.*

Section 1.

Origin of.

SOON after the ſtatute of uſes, the practice of conveying eſtates in ſtrict ſettlement became frequent. But as eſtates for life are not ſubject to dower, a power was uſually given to the tenant for life, of limiting an eſtate to any woman he ſhould marry, for her life, by way of jointure, which is now univerſally practiſed.

Conſtruction of the Words, not exceeding the clear yearly Value.

§ 2. In powers of this kind, the uſual phraſe is, that it ſhall be lawful for the tenant for life to appoint any part of the lands compriſed in the ſettlement to his wife, as a jointure, not exceeding the clear yearly value of a certain ſum.

Tyrconnel v. Ancaſter, Amb. R. 237. 2 Veſ. 502.

§ 3. A queſtion having ariſen in Lord *Hardwicke*'s time, reſpecting the conſtruction of this expreſſion, his Lordſhip ſaid, there were two things to be conſidered, firſt, what was the meaning of theſe words; and, ſecondly,

ſecondly, at what time they were to be applied. As to the time, they muſt be lands of the clear yearly value, expreſſed at the time of making the jointure; and there is no obligation on the remainder-man, or lien on his eſtate, to have the jointure continue of the ſame yearly value during the continuance of the jointure, which is always the rule in the execution of theſe powers; the contrary doctrine would be productive of very great inconvenience: theſe powers would then be executory and fluctuating: none would know when the power was executed. New bills muſt be brought againſt remainder-men, and the power muſt be executed by ſubſequent tenants for life.

This doctrine is applicable, not only to the execution of ſuch a power, as to charges on the eſtate, but alſo to the *quantum* of the land-tax: for, though that tax might riſe afterwards, the *quantum* of the jointure is not on that account to be varied. It is ſufficient that the maſter ſhould ſee it exonerated from the land-tax, according to the rate it ſtood at, when the power was executed; for otherwiſe it would follow, that whenever the land tax increaſed, it would create a deficiency in the jointure, and the jointreſs might come into a court of equity to have it made good againſt the remainder-man. The great queſtion then is, from what charges, impoſitions or outgoings, an eſtate of this kind ought to be exempted, at the time of making the jointure. The words are, *not exceeding the clear yearly value*, which do not extend to the land tax; clear muſt not mean all outgoings, ſuch as loſſes by tenants, management, &c. to which a rent-charge is not liable, but

what would be underſtood between buyer and ſeller; that is, all reprizes and incumbrances, and all extraordinary charges unuſual, and not agreeable to the cuſtom of the country; and then the land tax is not to be conſidered. The jointure, then, muſt be clear of incumbrances, and all other charges, which, by the courſe and uſage of the country in which the lands lie, ought to be borne by the tenant, but ſubject to the land tax and all other outgoings which, according to ſuch courſe of the country, ought to be borne by the landlord.

§ 4. Where a power of jointuring was given, not exceeding 4000 *l. per annum*, without any deduction or abatement for any taxes, charges, or impoſitions, impoſed or to be impoſed, parliamentary or otherwiſe, Lord *Hardwicke* held, this did not mean ſuch taxes only as were fixed and certain, but the land tax, though a fluctuating one, was clearly within the power.

Blandford v. Marlborough, 2 Atk. 542.

§ 5. It is now a common practice, to give tenants for life a power of appointing a rent-charge to their wives by way of jointure: and where the power is to appoint all or any part of the lands, the uſual way is to appoint certain lands to the wife, with a proviſo, that in caſe the perſon next in remainder ſhall pay to the wife a yearly ſum out of the rents as a jointure, then that he may retain the poſſeſſion of the lands.

§ 6. Where a perſon has a power to appoint a jointure, not exceeding 100 *l.* a year for every thouſand he

Power to limit a Jointure proportioned to the Wife's Fortune.

he acquires, as a marriage portion, and part of the wife's fortune is limited to the husband for life, remainder to increase the younger children's portions, although there be no younger children, and it goes back to the wife, yet it will be considered as received by the husband, and within the intent of the power, and the husband will be compelled to settle a jointure accordingly.

Tyrconnel v. D. of Ancaster, 2 Vef. 499.

§ 7. Sir *B. Sherrard*, being tenant for life, with such a power as is mentioned in the preceding section, married a Lady who had 10,000 *l.*, and, in consideration thereof, settled an estate on her of 800 *l.* a year, and covenanted to settle 200 *l.* more to make it up 1000 *l.*, and the sum of 2000 *l.*, part of the wife's fortune, was continued at interest for the benefit of the younger children, and, in case of no children, to go to the survivor; but the interest thereof was to be paid to the husband during his life. There were no children, and the wife survived.

The question was, what portion the husband was considered to have received with his wife, and, consequently, how many 100 *l. per annum* she was entitled to have.

Lord *Hardwicke*.—The question is, whether Sir *B. Sherrard* is to be considered as having received 8000 *l.* or 10,000 *l.* I am of opinion, he must be considered as having received a portion of 10,000 *l.* with his wife. The objection is, that 2000 *l.*, though part of her portion, was not received by Sir *B. Sherrard*, and that,

that, in conſequence of the ſettlement, it came back to her, there being no younger children, and is not to be conſidered as part of the portion, in conſideration of which, the jointure was made. But I am of opinion, that objection does not hold. I agree, that where a jointure is to be made under ſuch limited powers, of a portion to be received, the tranſaction muſt be fair, *bonâ fide* without fraud and colluſion; and, therefore, if it is a nominal, and not a real portion, that will not do; as, where a man who marries a lady with a ſmall portion, and either he or his friends advance money to make it up a nominal portion, and, after the marriage, take it back. So, if the wife had a portion which was ſettled to her ſeparate uſe, it would not do. Parents create theſe powers for the purpoſe of compelling their children to marry wives of an adequate fortune, and not to burthen the eſtate with a great jointure for a wife, who brings nothing into the family: whenever, therefore, the portion of the wife is ſtipulated to be applied in a proper and reaſonable manner, for the benefit of the family, that is to be conſidered as a portion received. The father could not mean that every part of this portion ſhould be received by his ſon to ſpend and waſte; if it was ſettled ſo as to become beneficial to the family, in the fair way of making ſettlements, it was ſufficient. Theſe parties were young at the time of marriage, and might have ſeveral children. It was reaſonable to take ſo much of the wife's fortune as an increaſe of the younger childrens portions, which the huſband had under his father's will a power to ſettle, nor was there any impropriety in giving the wife a chance of ſurvivorſhip. This, then, is an ap-

plication of the portion by the huſband, in a reaſonable and fair way, and, therefore, to be conſidered as within the intent of the power. If the intereſt of the 2000 *l.* had been only given to the huſband for life, and, afterwards, the principal to the wife, that would be a ſtrong caſe to ſay, it was not within the intent of the power. But the money being only given to the wife, on failure of younger children, and on the huſband's dying firſt, both which events happened, it differs from that caſe. If the portion was to be paid to the huſband, to do what he pleaſed with it, and not to be ſettled for the benefit of the family, fathers would hardly create ſuch a power. I therefore conſider, that what is fairly ſettled for the family, is for the benefit of the huſband, and, therefore, the widow is entitled to 1000 *l.* for her jointure.

Manſell v. Manſell, Harg. Jur. Arg. v. 1. 35.

§ 8. A power of jointuring a wife, may be reſtrained by a condition, that the marriage ſhall be with the conſent of a third perſon.

TITLE

TITLE XXXII.

DEED.

CHAP. XVIII.

Of Powers to Leaſe.

§ 1. *Origin of.*
2. *Conſtrued ſtrictly.*
5. *Reſtrictions annexed to leaſing Powers.*
6. *1ſt, As to the Inſtrument.*
8. *2d, As to the Lands to be leaſed.*
23. *3d, As to the Time when the Leaſe is to commence.*
34. *A general Power only authoriſes Leaſes in Poſſeſſion.*
§ 33. *Of concurrent Leaſes.*
39. *A Leaſe to commence from the Day of the Date, is not a Leaſe in Reverſion.*
41. *4th, As to the Duration of the Leaſe.*
47. *5th, As to the Rent.*
53. *6th, As to the Clauſes and Covenants.*
60. *In what Conveyances leaſing Powers may be inſerted.*

Section 1.

Origin of.

AS Leaſes made by tenants for life determine upon the death of the leſſor, powers are uſually inſerted in ſettlements, enabling the tenants for life to grant leaſes, which ſhall be valid againſt the perſons in remainder or reverſion.

1 Burr. Rep. 120.

Powers of this kind are productive of great advantages, not only to the tenants for life, and the perſons in remainder and reverſion, but alſo to the public: the tenants for life are thereby enabled to grant a certain term to the leſſee, by which means they get a higher rent, which is equally beneficial to the remainder-men and reverſioner; and the public is benefited by this

ſyſtem, becauſe the extent and ſecurity of the tenant's intereſt, induces him to expend his capital in the cultivation and improvement of the eſtate.

Conſtrued ſtrictly.

§ 2. But, leaſt the tenant for life ſhould exert this power to the prejudice of the perſons in remainder or reverſion, he is, in general, reſtrained by the words of the power, from making any leaſes but on certain conditions, by which means, the tenant for life is obliged to ſecure the ſame advantages to the remainder-men and reverſioner, which he reſerves for himſelf. The reſtrictive part of ſuch powers ought, therefore, to be conſtrued ſtrictly againſt the tenant for life, and in favour of the remainder-man and reverſioner; becauſe the conditions upon which the power is given, are inſerted with a view to their intereſt, and the leſſee under ſuch a leaſe, ſtanding only in the place of the tenant for life, and deriving his title merely under the power, if that be not completely executed, the right of the remainder-man to poſſeſs the eſtate, freed from the leaſe, will take place of the right of the leſſee, as ſuperior to it: from whence, it follows, that every circumſtance required by the power muſt be ſtrictly complied with, otherwiſe the leaſe will be void.

Doe v. Lady Cavan. 5 Term R. 567.

§ 3. Thus, it appears, that the inſtruments by which leaſing powers are executed, are conſtrued ſomewhat differently from other deeds of appointment; for, it being expreſsly required that tenants for life ſhould execute their powers of leaſing in a particular manner, that becomes a condition precedent; and if all the circumſtances required by the power are not complied

Vide Doe v. Sandham, infra.

complied with, the power is held to be totally unexecuted: ſo that, if an improper covenant is inſerted in a leaſe made in purſuance of a power, the leaſe is thereby void in its creation, and not the covenant only, and will not bind the remainder-man.

§ 4. Where a qualification is annexed to a general power of leaſing, which, if obſerved, goes in deſtruction of the power, the law will diſpenſe with ſuch qualification. Vide Cumberford's Caſe, infra, f. 15.

§ 5. The reſtrictions, which are uſually annexed to leaſing powers, relate, 1ſt, To the inſtrument by which the power is executed; 2d, To the lands to be let; 3d, To the time when the leaſe is to commence; 4th, To the duration of the leaſe; 5th, To the rent directed to be reſerved; and, 6th, To the clauſes and covenants directed to be inſerted in ſuch leaſes. Reſtrictions annexed to leaſing Powers.

§ 6. With reſpect to the inſtrument by which a leaſing power is directed to be executed, it is generally required to be by a deed indented, ſealed and delivered in the preſence of two or more witneſſes; and it is alſo uſually required, that the tenant ſhould execute a counterpart of ſuch indenture. 1ſt, As to the Inſtrument. 1 Burr. Rep. 125.

§ 7. Livery of ſeiſin is not neceſſary to be given on a freehold leaſe, made in execution of a power. Becauſe a leaſe made in execution of a power, takes effect from the deed by which the power is created; and the legal eſtate is transferred by the operation of the ſtatute of uſes. 1 Vent. 291. 2 Lev. 149.

2d. As to the Lands to be leaſed.

§ 8. With reſpect to the lands to be let, powers of leaſing are, in general, reſtrained to lands which have uſually been let or demiſed to farmers, in order to prevent the tenant for life from leaſing the manſion-houſe, parks, gardens, pleaſure grounds, or other parts of the land uſually occupied by the proprietors of the eſtate, and deemed neceſſary to the dignity of the family.

§ 9. This clauſe is copied from that which is inſerted in the ſtatute 32 *Hen.* 8. enabling tenants in tail to let leaſes: and the rules adopted by the courts of law, in caſes which have ariſen on that ſtatute, apply equally to leaſes made in purſuance of powers.

Vide Ante Ch. 7. ſ. 34.

Vaugh. 33.

§ 10. Lands which have been demiſed three times, are conſidered as lands uſually let; ſo lands which have been demiſed twice: but lands which have been only once let, do not fall within the deſcription of lands uſually let; for, *uſus fit ex iteratis actibus.*

§ 11. Lands not demiſed for the ſpace of 21 years previous to the making of a leaſe, under a power, are not conſidered as lands uſually let.

Triſtram v. Ballinglaſs, Vaugh. 31.

§ 12. A perſon was tenant for life, with power to make leaſes of all or any of the lands in an indenture of ſettlement particularly mentioned, which at any time theretofore had been uſually letten or demiſed, for and during the term of 21 years, reſerving the rents therefore then uſually paid, or more. The tenant for life made a leaſe of part of the premiſes contained in the ſettlement, which had been let at 100 *l.* *per annum* for

for 21 years; but the term of 21 years was expired, and the premiſes had not been letten for 21 years before the demiſe, under the power which was the ſubject in diſpute.

The queſtion was, whether theſe lands came within the deſcription of lands at any time heretofore uſually demiſed.

Lord Chief Juſtice *Vaughan* ſaid, the words uſually demiſed, might be taken in two ſenſes; the one, for the often farming or repeated acts of leaſing lands, to which ſenſe this caſe did reaſonably extend; the other, for the common continuance of lands in leaſe, for that was actually demiſed; and ſo lands leaſed for 500 years long ſince, were lands uſually demiſed, that was, in leaſe, though they had not been more than once demiſed: and the former conſtruction agreed both with the words and intention of the ſettlement. But what was not farmed at the time of this proviſo's being made, nor 20 years before, could not be ſaid to be at any time before commonly farmed: for thoſe 20 years was a time before, in which it was not farmed. Beſides the proviſo reſerving the rents thereupon reſerved at the time of the deed made, neceſſarily implied, that the land demiſable by that proviſo muſt be land which was then under rent; for, when no rent then was, the rent *then* thereupon reſerved, could not be reſerved. But the premiſes in queſtion had then no rent upon them, for they were not let for 20 years before, nor then, and, therefore, were not demiſable by that power.

§ 13. A cove-

Right v. Thomas, 3 Burr, 1441.

§ 13. A covenant to ſtand ſeiſed, is conſidered, in law, as evidence of the uſual manner of demiſing; and the objection, that the covenant to ſtand ſeiſed in queſtion, was by way of proviſion for a younger child, was deemed to be of no weight; for that was every day's practice.

§ 14. It has been already ſtated, that a qualification which goes in deſtruction of a power, will be diſpenſed with. In conſequence of this principle, it has been determined, that where a power of leaſing is given generally, provided the antient rents be reſerved, lands which were not before in leaſe may be demiſed.

Cumberford's Caſe, 2 Roll Ab. 262.

§ 15. A conveyance was made of divers manors, meſſuages, rents, ſervices, *&c.* to the uſe of *A. B.* for life, *&c.* with power to make leaſes of the premiſes, or any part or parcel thereof, for three lives, ſo that ſuch rent, or more, was reſerved upon every leaſe, as was reſerved or paid for that, within two years then next before. Some part of the premiſes conſiſted in woods, that had not been before leaſed, at any rent within the two years. It was determined, that the tenant for life might, by force of ſuch power, make leaſes of that part, reſerving ſuch rent as he pleaſed, becauſe it appeared by the generality of the words, that it was intended he ſhould have power to leaſe all the lands; and the reſtrictive clauſe was meant to apply only to ſuch lands as had been demiſed for two years before.

§ 16. An

§ 16. An eſtate, which conſiſted of lands and a rectory, &c. was conveyed to the uſe of a perſon for life, with a power to let the premiſes, or any part of them, ſo as a rent of 5 *s.* was reſerved for every acre of land. The tenant for life demiſed the rectory, which conſiſted of tithes only, reſerving a rent; and the queſtion was, whether the power warranted ſuch a leaſe. Walker v. Wakeman, 1 Vent. 294. 2 Lev. 150.

It was argued that it did not, for a conſtruction was to be made on the whole clauſes, and the latter words that appointed a reſervation of rent, ſhould explain the former, and reſtrain the general word premiſes to land only, or things out of which rent might iſſue, which it could not out of tithes.

But it was reſolved by the court, on the authority of *Cumberford*'s caſe, that the leaſe of the rectory was good; for the power was general, and enabling, and the laſt clauſe being affirmative, though reſtrictive, would not reſtrain the generality of the former ones. Therefore, here the power muſt be conſtrued to be, to demiſe the premiſes that conſiſted of acres at 5 *s.* an acre, but of what were not acres, no rent need be reſerved. Ante f. 15.

And it was ſaid by Lord *Hale*, that if the power had been to let the manor and rectory, expreſsly reſerving 5 *s. per* acre, the leaſe had been good of the rectory, without any rent. 3 Keb. 597.

§ 17. A manor and other hereditaments were ſettled, with a power to the tenant for life to make leaſes, excepting Winter v. Loveden, 1 L. Ray. 267. Com. R. 37. 12 Mod. 147.

cepting the ancient demeſne lands, and ſo as the ancient rent was reſerved.

It was determined, that this power did not enable the tenant for life to demiſe the copyhold lands held of the manor, becauſe they were not part of the demeſnes. But that the rents and ſervices of the manor might be demiſed, notwithſtanding that one qualification annexed to the exerciſe of it was, *that the ancient rent ſhould be reſerved*, and no rent could be reſerved on a leaſe of rents and ſervices; for it appeared, that part of the manor was intended to be compriſed within the power; but as the demeſne lands were not compriſed, the rents and ſervices muſt, for the whole manor conſiſted of demeſnes, rents and ſervices; and, if a man had a power reſerved to him of making leaſes of two things, and a qualification was annexed to the power, which could not extend to one of theſe things, he might make a leaſe of that thing without any regard to the qualification.

Goodtitle v. Funacan, Doug. 565.

§ 18. A tenant for life, with power to demiſe all the lands, reſerving ſo much, or a greater yearly rent, as then was paid, made a leaſe of a manor and fiſhery, which had never been let, together with other premiſes, reſerving a greater rent than had formerly been reſerved. It was contended, that the manor and fiſhery were not demiſable under the power, as no rent was then paid for them. But it was anſwered, that the qualification in the power, with regard to the reſervation of rent then paid, could only apply to ſuch parts of the ſubject of the power as were then let; but

but the power itſelf expreſsly extended to the manors and fiſhery, and it muſt have been known at the time of the ſettlement, that neither the manors nor fiſhery were then let; for, where a general authority is given by a power, to let manors, lands, *&c.* and afterwards, there is a qualification, that the uſual rent ſhall be reſerved, ſuch affirmative qualification ſhall not reſtrain the generality of the power, but ſhall only apply to that part which was formerly demiſed. It was objected, that as the rent was entire, and could not be apportioned, it was not clear that the ancient rent was reſerved for that part of the premiſes which had formerly been let. In anſwer to which, it was ſaid to be ſufficient, that the advance on the whole was 30 *l.*, and that the fiſhery was only worth 15 *l.* a year, and that the manor was not of any pecuniary value.

Lord *Mansfield.*— "The power is expreſs to demiſe "the manors and fiſheries; they are particularly men- "tioned in the ſettlement; and the power goes to the "whole: they pay under this leaſe as great a yearly "rent as at the time of the ſettlement, for they paid "nothing then; the words, therefore, are complied "with; and this objection could only ſtand upon "intent: but we think no ſuch intent appears. The "manors are nominal, of no value, no object of yearly "income; the fiſhery worth only 15 *l.* a year; they "are convenient to the leſſee living on the land, and "of no uſe to the remainder-man; the right of ſhoot- "ing and fiſhing is reſerved to him. For my own "part, I think the intent was to give leave to demiſe "all, reſerving as much rent in the whole, as had

" been paid before; and, in fact, 30 *l.* more has been " reſerved."

The court was of opinion, that the leaſe was good.

§ 19. A power may, however, be taken to be ſpecial, and not allowed to extend to all the property comprifed in the deed, wherein the power is given, if it appears from the nature of the power, compared with that of the property, to have been the intention of the parties, that it ſhould be ſpecial.

Mountjoy's Caſe, 5 Rep. 3 *b.*

§ 20. It was found by ſpecial verdict, that the manor of *Hemſtone Arundel* was intailed on Lady *Mountjoy*, with ſeveral remainders over, with a proviſo, that neither of the donees ſhould alien the ſaid manors, or any part thereof, but only for term of life, or for years, or at will, yielding the true and ancient rent. The manor conſiſted of ſeveral free rents and copyhold tenements, an acre of waſte, *&c.*

Lord *Mountjoy* and his wife demiſed a moiety of the manor, with the appurtenances, for 300 years.

It was reſolved, that, in reſpect of the ſaid acre of waſte, which was never demiſed before, the rent, which was entirely reſerved out of the whole, could not be ſaid to be *vetus et antiquus reditus*; for, how could it be called ſo, when it iſſued out of a thing which never was charged with any rent before.

§ 21. A power

§ 21. A power was given in a ſettlement, to make leaſes of all or any part of the premiſes, at ſuch yearly rents, or more, as the ſame were then let at: and the queſtion was, whether the manſion-houſe and demeſnes could be demiſed under this power.

Baggot v. Oughton, 8 Mod. 249. Fortes 332.

The court determined that they could not; and it is ſaid, that this judgment was affirmed by the Houſe of Lords.

§ 22. A power was given in a will to the tenant for life, to grant, demiſe, and leaſe all or any of the ſaid manors, parts of manors, meſſuages, lands, tenements, and hereditaments, ſo as the uſual rents, and other yearly payments, dues, reſervations, and heriots, ſhould be from time to time reſerved and made payable.

Pomery v. Partington, 3 Term Rep. 665.

The tenant for life made a leaſe of tithes which had never been let before, and the queſtion was, whether ſuch leaſe was good.

It was determined, that this leaſe was void, becauſe it was not the intention of the parties that the power of leaſing ſhould extend to the tithes, they never having been leaſed before.

Doe v. Halcombe, 7 Term Rep. 713.

§ 23. The third reſtriction uſually inſerted in powers of leaſing, relates to the time when the leaſe is to commence, whether in poſſeſſion or reverſion.

3d, As to the Time when the Leaſe is to commence.

A leaſe may be conſidered as reverſionary in two ſenſes. In the largeſt ſenſe, that is ſaid to be a leaſe

in reverſion which is to commence on a future day. In a more confined ſenſe of the term, it ſignifies a leaſe to begin from the determination of a leaſe in being; in which ſenſe, all leaſes where there is a particular eſtate outſtanding, are leaſes in reverſion; and ſo is the term reverſion to be taken, where mention is generally made of leaſes in reverſion under a power.

Doe v. Calvert, 2 Eaſt. R. 376.

A General Power only authoriſes Leaſes in Poſſeſſion.

§ 24. Where a power is given indefinitely to make leaſes, without mentioning the time when ſuch leaſes are to commence, it ſhall be taken ſtrictly againſt the donee of the power, and conſequently be conſtrued ſo as only to authorize leaſes in poſſeſſion, and not in reverſion.

Suffolk v. Wroth, Cro. Eliz. 5. 6 Rep. 33 *a*.

§ 25. *Henry* Earl of *Suffolk* conveyed the manor of *Burham* to the uſe of himſelf for life, remainder to his wife for life, *&c.* with a proviſo, that it ſhould be lawful for the Earl to make leaſes for twenty-one years. The Earl made a leaſe for twenty-one years, to begin on the *Michaelmas* following: and it was adjudged that this leaſe was not warranted by the power, becauſe it was a leaſe in reverſion; and if he might make a leaſe to commence on the *Michaelmas* following, he might make it commence twenty years after, which would deſtroy the effect of the ſettlement.

§ 26. A power to make leaſes generally, does not enable the donee of ſuch a power, to make a leaſe to commence after the determination of a leaſe in being.

§ 27. A tenant

§ 27. A tenant for life, having a power to make leaſes for twenty-one years, made a leaſe to commence after the determination of a leaſe then in being. It was adjudged that ſuch leaſe was void, for it ought to have been a leaſe in poſſeſſion, and not an intereſt to begin *in futuro*, or reverſion, after another eſtate determined. Shecomb v. Hawkins, Cro. Ja. 318.

§ 28. In a modern caſe it was determined, that where a ſettlement was made of the reverſion of lands, demiſed for lives or years, to the uſe of *B.* for life, with power to make leaſes generally, he might make a leaſe during the continuance of a former leaſe, to commence after the former; for otherwiſe the power would be ineffectual. Coventry v. Coventry, Com. R. 312. Vide Baynes v. Belſon, T. Raym. 247.

§ 29. Where, in a ſettlement of an eſtate in reverſion, a power is expreſsly given to make leaſes in poſſeſſion, a leaſe in reverſion will not be warranted thereby.

§ 30. A father and a ſon made a leaſe for ninety-nine years, if three perſons or one of them ſhould ſo long live. Afterwards they ſettled the reverſion to the uſe of the father for life, remainder to the ſon for life, remainder over; with a power to the father to make leaſes for ninety-nine years or three lives, in poſſeſſion, or for two lives in poſſeſſion, and one in reverſion, or for one life in poſſeſſion and two in reverſion; the father, during the continuance of the firſt leaſe, made a leaſe for life. Opey v. Thomaſins, T. Raym. 132.

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n deviſed lands to his ſon [illegible] life, Read v. Naſh, 1 Leon. 137.
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Juſtice *Keeling* inclined, that the leaſe was within the power, for the ſettlement being only of the reverſion, a preſent leaſe of the reverſion was within it. *Windham* and *Twiſden* held, that the ſettlement being of a reverſion, if the words of the power had been general, to make leaſes, a leaſe in reverſion had been within it. But the power being expreſsly to make leaſes in poſſeſſion, this leaſe in reverſion was not within it; but the caſe was adjourned.

§ 31. Where a power expreſsly enables a perſon to make leaſes, as well in poſſeſſion as in reverſion, a leaſe in reverſion will then be good.

Whitlocke's Caſe, 8 Rep. 67.

§ 32. *William Whitlock* being a tenant for life in reverſion, with a power to make leaſes, as well in poſſeſſion as in reverſion, demiſed the premiſes for ninety-nine years, if two perſons ſhould ſo long live, the ſaid term to commence after the death or determination of the eſtate of the prior tenant for life. And it was held to be a good leaſe under the power.

Of Concurrent Leaſes.

§ 33. The expreſſion to leaſe in reverſion, in its narroweſt ſenſe, hath ſtill a different ſignification from either of thoſe above mentioned, when applied in a power, to the making a leaſe for lives in reverſion. For as a leaſe for lives cannot, ſtrictly ſpeaking, be made to commence *in futuro*, it will in that caſe be intended of a concurrent leaſe, or a leaſe of the reverſion, that is, of that land, which is then in leaſe, to commence in poſſeſſion, after the determination of the exiſting leaſe, though it commences in in-

1 Ld. Ray. 269. 1 Com. R. 39. Fox v. Prickwood, Cro. Ja. 349.

tereſt preſently, and is concurrent with the exiſting leaſe.

§ 34. In conſequence of this doctrine, the very ſame words, in the ſame identical power, may have different ſignifications, when applied to different ſubjects; for when the words, "a leaſe in reverſion" are applied to a leaſe for life, they ſhall be underſtood to mean a concurrent leaſe, or leaſe of the reverſion, that is a leaſe of that land which is at the ſame time under a demiſe, and then it is not to commence at the end of the demiſe, but has a preſent commencement, and is concurrent with the prior demiſe. But the ſame words, when applied to a leaſe for years, ſhall be intended of a leaſe, which ſhall take effect after the expiration of the exiſting leaſe. 1 Com. Rep. 38, 39.

§ 35. It was ſaid at the ſame time, by Lord Chief Juſtice *Holt*, that if a power enabled any one to make leaſes in reverſion, as well as in poſſeſſion, he could not make a leaſe in poſſeſſion, and another in reverſion, of the ſame land: but his power to make leaſes in reverſion ſhould be confined to ſuch land as was not then in poſſeſſion.

§ 36. Where a perſon has a general power to make leaſes, he may make a leaſe to commence immediately, although the lands are then held under an exiſting leaſe, made either by a former proprietor, or by the perſon making ſuch leaſe. Berry v. Rich, Hard. 412.

§ 37. A perſon deviſed lands to his ſon for life, remainder over, with a proviſo, that if his ſon made Read v. Naſh, 1 Leon. 137.

any alienation, *&c.* otherwiſe than a leaſe for twenty-one years, then he ſhould forfeit his eſtate.

The ſon made a leaſe for twenty-one years, and a year before the expiration of that leaſe, he made another leaſe for twenty-one years, to begin immediately. The queſtion was, whether the laſt leaſe was authoriſed by the power: it was ſaid, that although the tenant for life could not, under the power, make leaſes in reverſion, for then he might charge the inheritance *in infinitum*, yet ſuch a leaſe as this was good; for it was to begin preſently, ſo that the inheritance could not be charged in the whole for more than twenty-one years, and the court ſeems to have been of this opinion.

Goodtitle v. Funucan, Doug. 565.

§ 38. A perſon was tenant for life, with power, when in the actual poſſeſſion of the premiſes, to demiſe the ſame to any perſon or perſons, *in poſſeſſion, but not by way of reverſion, or future intereſt*, for the term of twenty-one years, determinable on lives: the lands were let for a year, and then the tenant for life by indenture, reciting his power, demiſed them for ninety-nine years, determinable on the life of the leſſee; and directions were given to the tenant for a year, to pay his rent to the leſſee, which he accordingly did. It was contended that this was a leaſe in reverſion, and therefore void; but Lord *Mansfield* ſaid, it was good as a concurrent leaſe, upon the authority of the caſe of *Read* v. *Naſh*. The words of the ſtatute 13 *Eliz.* c. 10. as ſtrongly require eccleſiaſtical leaſes to be in poſſeſſion, and not in reverſion,

Ante f. 37.

as

as thoſe in this or any of the common powers to tenants for life, yet in the caſe of *Fox* v. *Collier*, 1. And. 65. all the judges held, that an immediate leaſe for twenty-one years, of premiſes, on which there was a ſubſiſting leaſe for four years, was good.

A Leaſe to commence from the Day of the Date is not a Leaſe in Reverſion.

§ 39. It was formerly held, that a leaſe made to commence, from the day of the date thereof, was a leaſe in reverſion; but this doctrine has been altered by the following determination.

Pugh v. Duke of Leeds, Cowp. 714.

§ 40. A tenant for life, with power to make leaſes for twenty-one years in poſſeſſion, and not in reverſion, made a leaſe to his daughter, *habendum* from the day of the date of the ſaid indenture, for twenty-one years.

Lord *Mansfield*, after ſtating all the authorities on this ſubject, declared that *from*, might in the vulgar ſenſe, and even in the ſtrict propriety of language, mean either *incluſive* or *excluſive*. That the parties neceſſarily underſtood and uſed it in that ſenſe which made the deed effectual. That courts of juſtice are to conſtrue the words of parties, ſo as to effectuate theſe deeds, and not to deſtroy them; more eſpecially when the words themſelves, abſtractedly, may admit of either meaning. It was therefore adjudged that the leaſe was to be deemed a leaſe in poſſeſſion, and therefore good, being warranted by the power.

4th, As to the Duration of the Leaſe.

§ 41. The fourth reſtriction uſually inſerted in powers of leaſing, relates to the duration of the leaſe.

The uſual practice is, to reſtrain tenants for life from making leaſes for a longer term than twenty-one years, except in thoſe countries where lands are uſually let for lives, and there the tenant for life is allowed to grant leaſes for one, two, or three lives.

8 Rep. 70 *b.*

§ 42. A diſtinction is taken in *Whitlock*'s caſe, where a power to make leaſes is, in the beginning, general, abſolute, affirmative, and indefinite, as to make a leaſe or leaſes, grant or grants, *&c.* without any reſtriction, and then a proviſo of correction added, namely, that ſuch leaſe or leaſes, grant or grants, *&c.* ſhall not exceed the number of three lives, at moſt, or twenty-one years; which clauſe is negative, and qualifies the generality of the power; and where the power is particular, entire, and affirmative; for in the firſt caſe, the donee of the power may make any leaſe or grant, provided it does not exceed the utmoſt extent of intereſt that the power warrants; as if a perſon has a power to make leaſes, provided they do not exceed the number of three lives or twenty-one years, there he may make a leaſe for ninety-nine years, if three lives ſhall ſo long live, for that does not exceed the number of three lives, but in truth is leſs. But in the ſecond caſe he muſt purſue the power which is particular and entire; as if a perſon has a power of making leaſes for three lives or twenty-one years, he cannot make a leaſe for ninety-nine years, if three lives ſhall ſo long live.

Alſop v. Pine, 3 Keb. 44.

§ 43. Where a power is given to make leaſes for three lives, it will be well executed by a leaſe for three lives,

lives, and the life of the longeſt liver of them, becauſe that is the ſame thing.

§ 44. A perſon was tenant for life, with power to demiſe the premiſes in poſſeſſion, for one, two, or three lives; or for thirty years, or any other number of years, determinable upon one, two, or three lives; or in reverſion for one, two, or three lives, or for thirty years, or any other number of years, determinable upon one, two, or three lives. Winter v. Loveden, Ante f. 22.

It was held, that an abſolute leaſe for thirty years was good under this power.

§ 45. A power to let leaſes, provided they do not exceed thirty-one years, or three lives, will warrant a leaſe for three lives or thirty-one years, whichever ſhall laſt longeſt.

§ 46. Lord *Netterville*, being tenant for life, with a power of making leaſes, for any term or time, not exceeding thirty-one years *or* three lives, to commence in poſſeſſion, made a leaſe for the lives of three perſons, and the longeſt liver of them, or for thirty-one years, which ſhould laſt longeſt. Commons v. Marſhall, 6 Bro. Parl. Ca. 168.

On a queſtion, whether this leaſe was warranted by the power, it was determined by the Court of Exchequer, and alſo by the Court of Exchequer Chamber, in *Ireland*, that the leaſe was good.

On a writ of error to the Houſe of Lords, of *England*, it was contended on the part of the remainder

man, that the power was in the disjunctive, that leaſes might be made for any term not exceeding thirty-one years, or three lives; but the leaſe in queſtion was made for three lives, or for the term of thirty-one years, which ſhould laſt longeſt; ſo that inſtead of leaſing expreſsly for one or other of the terms given by the power, Lord *Netterville* leaſed for one or the other, as chance ſhould direct, in manifeſt oppoſition to his power; nor could this exceſs be made good by conſtruing *or* into *and*, and ſo making it be a certain term for lives, with a remainder for thirty-one years, for the words *which ſhall laſt longeſt*, ſhow that both were not intended to paſs, but one only, and which it ſhould be was to depend on the event mentioned, and could not therefore commence in poſſeſſion at the making of the leaſe, as expreſsly required by the power. On the other ſide it was argued, that of all powers that of leaſing was the moſt favoured, for obvious reaſons of public policy, as it would be a great diſcouragement to agriculture, if men who had laid out their ſubſtance, on the faith of their leaſes, in the cultivation of their farms, were to be deprived of thoſe leaſes, on nice and critical objections to the form of them. The hardſhip would be greater where the objections were drawn from the terms of the power, of which the tenant was very unlikely to have any knowledge, it being notorious that in the caſe of families of any conſideration, their tenants take, without any enquiry, ſuch leaſe as their landlords propoſe to grant, confiding that they have the power they aſſume. As to the objection that the leaſe in queſtion, being for three lives or thirty-one years,

years, was void for uncertainty, it was said that *or* had in many cases been construed *and*, and would always be so where the intention required it. But it was not contended that the power, though it would authorize *either*, would warrant both. But courts of law having in modern times adopted the same rules of construction, as obtain in courts of equity, in the construction of powers, and the instruments by which they are executed, would, when they were exceeded, correct the excess, and support the execution, so far as it was warranted by the power. The lease in question, so far as it was a lease for three lives, was clearly warranted by the power, and this was apparently the primary object of the parties. Besides this, they had a second object in view, which was, to secure the estate to the lessee, for thirty-one years, in case the lease for lives should determine sooner; but this, whether it was considered as concurrent or contingent, was not warranted by the power,

After hearing counsel, the Judges were directed to deliver their opinion on the following question, "Whether the lease stated in the special verdict, "could be supported as a good execution of the "power, or whether such lease was absolutely void?"

The Judges gave their unanimous opinion, that the lease might be supported, as a good execution of the power; whereupon the judgment was affirmed. Doe v. Halcombe, 7 Term R. 713.

§ 47. The fifth restriction usually inserted in powers of leasing, relates to the rent directed to be reserved. 5th, As to the Rent.

In

In reſpect to which it is to be obſerved, that the rules of law adopted in caſes of eccleſiaſtical leaſes, and of leaſes made by tenants in tail, under the ſtatute of 32 *Hen.* 8. apply equally to leaſes made by virtue of powers in ſettlements. The uſual practice is, to require that the rent to be reſerved, ſhall be the ancient, uſual, and accuſtomed rent, in order that the perſons in remainder may not be prejudiced by ſuch leaſes; but doubts have ariſen reſpecting the conſtruction of theſe words. Lord *Holt* was of opinion that the words ancient and accuſtomed rent, meant that rent which was reſerved when the power was created, if a leaſe were then in being; or that which was laſt before reſerved, if no leaſe were in being, for he who created ſuch a power intended no more than that the tenant for life ſhould not be able to put the eſtate in a worſe condition than it was in when the power was created.

3 Cha. Rep. 66.

Idem.

Lord *Cowper* doubted as to this point, and ſuggeſted, that if lands were leaſed, once at a greater, and twice at a leſſer rent, he ſhould conſider the rent of the former leaſe to be the ancient rent. The laſt leaſe might be made by the perſon who had the fee, and who was not bound to reſerve the ancient rent, but might let it for nothing if he pleaſed. He likewiſe ſaid, this rule could not apply to lands anciently demiſed, where fines had been taken, for there the rents were more or leſs, as the fines were higher or lower. Both theſe opinions ſeem maintainable under different circumſtances, for where lands have been uſually letten at rack rents, the rent that was laſt reſerved, upon leaſes preceding the creation of the power,

power, ſhould be underſtood to be the rent alluded to by the perſon creating the power. But if the owner of the freehold has not let his lands at a rack rent, but has taken fines, it appears reaſonable, that in ſuch a caſe, the laſt rent reſerved where no fine was taken, ſhould be the criterion.

§ 48. Where lands have been uſually leaſed for lives, and the uſual profits made by fines; a tenant for life under a ſettlement, with a power to leaſe, reſerving ſo much or more yearly rent, as had been received for the premiſes within twenty years then laſt paſt, will not be obliged to let the lands at a rack rent, but may demiſe them, reſerving the uſual fines and rent; as a leaſe at a rack rent may be inconſiſtent with the nature of the eſtates.

Right v. Thomas, 3 Burr. 1447.

§ 49. It is not only neceſſary to reſerve the ancient rent, but it muſt alſo iſſue out of the ſame lands, from which it was formerly reſerved: for where two diſtinct farms are joined together, the whole rent which is reſerved out of both, is a new rent, and not the ancient accuſtomed rent.

5 Rep. 5 *b.* 3 Rep. in Cha. 56.

§ 50. Where a power required that two-thirds of the improved value ſhould be reſerved as a rent, the reſervation might formerly have been made in the terms of the power; but, in general, it ſeems neceſſary, that the preciſe ſum intended to be reſerved, ſhould be ſpecified in the leaſe; for, otherwiſe, the remainder-man may be put to infinite trouble and expence

Clere's Caſe, 6 Rep. 17. 4th Point.

1 Vent. 338. pence, in proving the value of the lands demiſed, or the *quantum* of the ancient rent.

Hamilton v. Mordaunt, 6 Bro. Parl. Ca. 145.

§ 51. In a ſettlement made on the marriage of Lord *Brandon*, eldeſt ſon of the Earl of *Macclesfield*, a power was given to the ſucceſſive tenants for 99 years, determinable on their lives, to leaſe all the premiſes, ſo as, upon every ſuch leaſe of ſuch parts of the premiſes as had been anciently and accuſtomably demiſed, whereof fines had been uſually taken, the old uſual and accuſtomed yearly rent or rents, or more, ſhould be yearly reſerved and made payable; and ſo as upon every leaſe of ſuch part of the premiſes as had not been uſually let, and for which there had not been any fine or fines uſually taken, there ſhould be reſerved and made payable the moſt and beſt improved yearly rent that could be reaſonably had or obtained for the ſame.

A tenant in poſſeſſion for 99 years under the ſettlement, being deſirous to make leaſes for the benefit of his family, and ſeized with a ſudden indiſpoſition, when he had no rent-rolls or old leaſes, made a leaſe by indenture, of all the lands which had been uſually letten, and fines taken for the ſame, yielding and paying *the ſeveral and reſpective old accuſtomed rents reſerved and payable for the ſame;* and alſo another leaſe, whereby part of the premiſes, for which fines had not been uſually taken, and of which there was then no leaſe [illegible], or for any life in being, were leaſed, yield[illegible]*um* and ſums of money, as ſhould amount to [illegible]nd beſt improved yearly rent that could be reaſonably,

reaſonably had and obtained for the ſame. A queſtion having ariſen on the validity of theſe leaſes, the latter of them was given up by the leſſees, a reſervation of the moſt improved rents being ſo uncertain, that it could not be ſupported. And as to the former, after a hearing before Lord Chancellor *Cowper*, aſſiſted by the Chief Juſtices *Holt* and *Trevor*, it was held not to be warranted by the power, contrary to the opinion of *Holt*.

On an appeal to the Houſe of Lords, it was ſaid on the part of the appellants, that the objections made at the hearing to the validity of the leaſe, were, firſt, That it ought to have mentioned the particular rent reſerved; ſecondly, That the ancient and accuſtomed rent was thereby reſerved, as well for lands not anciently leaſed, as for thoſe that were. As to the firſt objection, it was argued, that the ſpecifying a certain ſum in the reſervation of a leaſe was clearly not neceſſary, if the particular rent intended might be known by proper reference; *id certum eſt quod certum reddi poteſt*, was an undoubted maxim, both in law and reaſon.

What thoſe ancient rents were, was a matter of fact capable of being known, and without difficulty, by thoſe who had the writings of the eſtate. That the reſervation was in the ſame terms with the power, and, conſequently, was purſuant to it. That the plain meaning of the reſtriction in this power, was to ſecure the ancient rents to the remainder-man; if he had theſe, he had all that was intended him, and there could

could be no doubt but he would be entitled to them by this reſervation. As to the other objection, it was argued, that the demiſe in the words of it was ſeveral; that the reſervation of the ſeveral and reſpective ancient rents, for the ſeveral and reſpective meſſuages, &c. could not mean any thing but ſuch rent for each tenement, as was anciently reſerved for the ſame, and it would be difficult to uſe plainer and ſtronger words to import the meaning; that the words *yielding therefore* muſt be underſtood *reddendo ſingula ſingulis*, and which method of interpretation the law preſcribes in many inſtances, not ſo ſtrong as this; ſo that, as to thoſe parts of the eſtate demiſed, if there was any which had no ancient rent, no rent was reſerved by this reſervation, and, conſequently, as to thoſe, the power was not executed.

On the other ſide, it was inſiſted, that as to the leaſe, upon which the rent reſerved was mentioned to be *the moſt improved rent*, this reſervation was plainly void, for the abſolute uncertainty of it, conſequently, that leaſe was not warranted by the power, and was accordingly given up at the hearing. And as to the other leaſe *under the ſeveral and reſpective old and accuſtomed rents reſerved and payable for the ſaid premiſes*, this was alſo void, as againſt the remainderman, and not warranted by the power; becauſe there being many farms, and a great eſtate within this one leaſe, ſome let at the ancient rents, and ſome not, it would put inſuperable difficulties upon the remainderman to recover his rent; for that, in the action and avowries to be made for the rent, he muſt be ſo lucky

as

as to point out what was the old rent, for what and for how much land it was paid, and at what times payable: and if the tenant could prove that a different rent was paid for the land, or that any other land was compriſed in the leaſe, or that the rent was formerly payable at any other day, the remainder-man could not recover; but, inſtead of recovering the rent, muſt from time to time pay him coſts; whereas it was intended, that the remainder-man ſhould have as plain, certain, and eaſy a remedy for his rent, as other landlords have. But, upon the leaſe in queſtion, it neither appeared what the rent was, which the remainder-man was to have, nor for what eſtate the rent was to be paid, nor when, or on what days it was to grow due, the leaſe giving the remainder-man no manner of light as to thoſe particulars. That as theſe powers of leaſing are generally reſerved in all ſettlement, if ſo looſe an exerciſe of them ſhould be allowed to the tenant for life, it would introduce the greateſt difficulties, and put the greateſt hardſhip upon the jointreſs, ſons, and other perſons claiming in remainder under ſuch ſettlements; and, by ſuch a conſtruction, the tenants for life, by an uncertain, general, and ſhort leaſe of the whole eſtate, which might be a raſh and ſudden act, and done with very little expence of money, time, or trouble, would be enabled to render the remainders, though ſettled on the higheſt conſideration, of very little value, becauſe the perſons to whom ſuch remainders belonged, would be in a great meaſure diſabled from recovering any rent.

After

After hearing the opinion of the Judges, the decree was affirmed.

Cumberford's Caſe, ante f. 15.

§ 52. Where lands have never been demiſed at all, and a power is given to leaſe them, reſerving ſuch rent as was reſerved for them within the two preceding years, a leaſe may be made of them, reſerving any rent that the leſſor pleaſes.

6th, As to the Clauſes and Covenants.

§ 53. The ſixth reſtriction uſually inſerted in powers of leaſing, relates to the clauſes and covenants directed to be inſerted in ſuch leaſes. And it is a general rule, that all thoſe clauſes, covenants, and reſervations required by the power, muſt be inſerted; otherwiſe the leaſe will be void againſt the remainder-men and reverſioner.

Earl of Cardigan v. Montague, cited 1 Burr. Rep. 122.

§ 54. The Duke of *Montague* was tenant for life, with power to leaſe, reſerving the ancient uſual and accuſtomed rents, heriots, boons, and ſervices. In the former leaſes, the tenants covenanted to keep in repair, and that covenant was omitted.

The Lord Chancellor was of opinion, that the covenant was a boon, and beneficial to the remainder-man, and held the leaſes void for want of it. He took ſome days to conſider, and declared he was clear upon the argument, but took time, becauſe there was no caſe in point. The more he thought of it, the more he was convinced. The principle he reſted upon, was, that the eſtate muſt come to the remainder-man in as beneficial a manner as ancient owners held it.

§ 55. The

§ 55. The omiſſion of a covenant for payment of rent, will alſo vitiate a leaſe, made under a power; for a mere reſervation of rent does not make it payable until entry, and therefore it, in fact, may not be payable during the term. Beſides, if there be no covenant to pay the rent, it may be aſſigned to a ſucceſſion of beggars. 1 Burr. Rep. 125.

§ 56. The omiſſion of a clauſe of re-entry, will alſo invalidate a leaſe of this kind; for, if ſuch a clauſe be not inſerted, the ground may be unoccupied, without a ſufficient diſtreſs upon it; ſo that the remainder-man can neither have his rent, nor his land.

§ 57. A perſon having a leaſing power, reſerving uſual and reaſonable covenants, demiſed a houſe to *William Sandham*, with a proviſo, that in caſe the premiſes were blown down, or burned, the leſſor ſhould rebuild them, otherwiſe the rent ſhould ceaſe. The jury found, that this was an unuſual and unheard of covenant, on the part of the leſſor; and it was adjudged that the leaſe was void. Doe v. Sandham, 1 Term Rep. 705.

§ 58. If, however, the covenants in a leaſe made under a power, be, upon the whole, ſuch as place the parties upon the ſame footing, as under former leaſes, their differing in trifling circumſtances will not invalidate the leaſe.

§ 59. In the caſe of *Goodtitle* v. *Funucan*, it was objected, that the covenants in the leaſe were not ſo beneficial to the remainder-man as thoſe in the ancient Ante f. 38.

leaſes; by one of which, the tenant covenanted to pay half the land tax, and, by the other, the leſſor covenanted to free the tenant from tithes, and all church dues; whereas, in the former leaſes, the tenants covenanted to pay all duties and taxes, except the land tax: church dues were, by law, particularly chargeable upon the occupier. The court ſaid, the power did not mention covenants, and that, what was thrown on the landlord, was compenſated by what was paid by the tenant.

In what Conveyances leaſing Powers may be inſerted. 1 Rep. 176 *b*. Poph. 81. Cro. Jac. 181. Jenk 247.

§ 60. It is laid down in *Mildmay*'s caſe, that although a power of leaſing may be reſerved in a declaration of uſes of a fine or recovery, yet that no ſuch power can be reſerved in a bargain and ſale, or covenant to ſtand ſeiſed; for, as uſes may be raiſed on a fine or recovery without any conſideration, therefore a uſe will ariſe to the leſſees without conſideration, and the former eſtates being raiſed without conſideration, may be defeated without conſideration. But as no uſes can ariſe on a bargain and ſale or covenant to ſtand ſeiſed without conſideration, therefore no uſe can ariſe to the leſſees; for, where the perſons are altogether uncertain, and the terms unknown, there can be no conſideration; ſo that the former eſtates which were raiſed upon conſideration, cannot be defeated by ſuch leaſes.

1 Rep. 176. Baynes v. Belſon, T. Raym. 247.

§ 61. This principle ſeems to be much too general, nor is it warranted by *Mildmay*'s caſe, which is univerſally cited as an authority to ſupport it. That caſe was thus: A perſon having three daughters, covenanted

nanted to ſtand ſeiſed to the uſe of himſelf for life, remainder to the uſe of his daughters in tail, with a proviſo, that it ſhould be lawful for the covenantor to limit any part of the lands to any perſon or perſons for any life or lives, or years, for the payment of his debts, performance of his legacies, preferment of his ſervants, or any other reaſonable conſiderations. The covenantor, by his will, limited a conſiderable part of the premiſes to one of his daughters for a hundred years, without reſerving any rent, and it was reſolved, that this power was void in its creation.

§ 62. Now, as the leaſe in *Mildmay*'s caſe was made without any conſideration, it does not follow, from the determination in that caſe, that thoſe powers of leaſing which are given in modern ſettlements, may not be valid, though inſerted in a bargain and ſale, or covenant to ſtand ſeiſed, as it is always required that the beſt and moſt improved rent ſhould be reſerved. And Lord *Mansfield* has ſaid, that a leſſee at a rack-rent is a purchaſer for a valuable conſideration, and that powers of leaſing were equally beneficial to the tenant for life and the remainder-man.

Doug. 22. Black. R. 1019.

§ 63. Where a tenant for life makes a leaſe not warranted by his power, it is abſolutely void, as to the perſon in remainder or reverſion, and not merely voidable.

Where the Power is not well executed, the Leaſe is void. Doe v. Watts, 7 Term R. 83.

TITLE XXXII.

DEED.

CHAP. XIX.

In what Caſes Equity will ſupport a Defective Execution of a Power.

§ 1. *Principles on which this Doctrine is founded.*
2. *Where there is a Conſideration.*
11. *Where there is Fraud.*
§ 13. *Where a complete Execution is prevented by Accident.*
14. *But a Non-execution will not be ſupplied.*

Section 1.

Principles on which this Doctrine is founded.

WE have ſeen that the courts of law have, in all caſes, conſtrued powers ſtrictly, and have required, that every circumſtance preſcribed, ſhould be complied with. But the courts of equity have aſſumed a juriſdiction in matters of this kind, and have given relief and ſupplied a defective execution of powers, in the following inſtances.

Treat. of Eq. B.1.ch.4.ſ.25.

1ſt, Where there is a conſideration, as for payment of debts, or proviſion for children, and no better on the other ſide. 2d, Where there is any fraud, or the party is guilty of any deceit or falſehood, by which the execution is prevented, for he in remainder ſhall not take advantage of his own wrong. 3d, Accident, or an impoſſibility of complying with the circumſtances, ſince

ſince it would be unconſcionable in the remainder-man to take advantage of theſe, provided the perſon having the power does all he can.

Where there is a Conſideration.

§ 2. With reſpect to the firſt ground upon which a court of equity will ſupply a defect in the execution of a power, namely, where there is a ſufficient conſideration, it has been determined, that a covenant in marriage articles, to ſettle a jointure, under a power, on an intended wife, was a good execution of ſuch a power; becauſe a wife is conſidered, in equity, as a purchaſer for a valuable conſideration, of her jointure, or of whatever elſe is ſtipulated, before marriage, for her benefit.

Coventry v. Coventry, Max. in Eq. 2 P. W. 122.

§ 3. Lord *Coventry* being tenant for life under his father's will, with a power, by any writing under his hand and ſeal, to ſettle any part of the eſtates compriſed in his father's will, not exceeding 500 *l.* a year, on any woman he ſhould marry, for her jointure, ſo as ſuch wife brought a portion equivalent to ſuch a jointure.

Lord *Coventry*, in conſideration of a marriage and 10,000 *l.* portion, executed articles by which he covenanted, that he or his heirs would, after the marriage, according to his power, or otherwiſe, by good conveyances, ſettle lands of the yearly value of 500 *l.* on his lady, for her jointure. Soon after the marriage was ſolemnized, Lord *Coventry* went to his country ſeat and delivered the articles to his ſteward, with direc-

tions to look over his rental, and find out an unincumbered part of his eſtate, to ſettle as a jointure.

A part of the eſtate being fixed upon, and a particular made thereof, a ſettlement and appointment of it was accordingly drawn and engroſſed, and left with Lord *Coventry*'s ſteward for execution. From various circumſtances, the execution of this deed was delayed, and Lord *C.* died without having executed it. On a bill brought by the widow againſt the remainderman, under the original will, and the perſonal repreſentatives of Lord *Coventry*, the principal queſtion was, whether the covenant contained in the marriage articles, ſhould be deemed a good execution of the power. Lord Chancellor *Macclesfield*, the Maſter of the Rolls, Baron *Price*, and Baron *Gilbert*, were clearly of opinion, that the covenant contained in the marriage articles operated, in equity, as an execution of the power, and a charge and lien upon the remainder.

Vide 2 P. W. 233. N. 1.

§ 4. A covenant is alſo a good execution of a power, when ſuch covenant is entered into for the benefit of younger children: becauſe parents are under a moral obligation to provide for them.

Sarth v. Blanfrey, Gilb. Rep. 166.

§ 5. A perſon ſettled lands to the uſe of himſelf for life, and then, as to part, to his wife for life, for her jointure, then to the iſſue male of his own body, with ſeveral remainders over; with a proviſo, that if he ſhould have any younger children, it ſhould be lawful for him, by deed or will, executed in the preſence of two

or

or more credible witneſſes, to limit and appoint any of the ſaid lands (except thoſe limited in jointure) to ſuch perſons, and for ſuch eſtates, as he ſhould think fit, for raiſing 500 *l.* a piece for younger children, to be paid at ſuch times, and in ſuch manner, as he by ſuch deed or will ſhould declare, and covenanted to do accordingly.

The perſon to whom this power was given died, leaving ſeveral younger children, but did not make any appointment.

It was decreed, that this was a charge upon the lands, and bound the iſſue in tail; the covenant being looked upon as an execution of the appointment, in purſuance of the power.

§ 6. A power expreſsly directed to be executed by deed, will be deemed, in equity, to be well executed by a will, where it is in favour of a wife.

§ 7. A huſband, by virtue of a ſettlement made upon him by an anceſtor, was tenant for life, with remainder to his firſt and other ſons in tail male, with with a power to the huſband, to make a jointure on his wife, by a deed under his hand and ſeal. Tollett v. Tollett, 2 P. W. 488.

The huſband having made no proviſion for his wife, and, being in the *Iſle of Man*, by his laſt will under his hand and ſeal, deviſed part of his lands within his power, to his wife for life.

It was objected, that this conveyance, being by a will, was not warranted by the power, which directed that it ſhould be by deed.

Maſter of the Rolls.—"This is a proviſion for a "wife, who had none before, and within the ſame "reaſon, as a proviſion for a child, not before pro- "vided for; and as a court of equity would, had this "been the caſe of a copyhold deviſed, have ſupplied "the want of a ſurrender; ſo, where there is a defec- "tive execution of a power, be it either for payment "of debts, or proviſion for a wife or children unpro- "vided for, I ſhall equally ſupply any defect of this "nature."

§ 8. Where a power is directed to be executed by a deed, atteſted by three witneſſes, a deed which is only atteſted by two witneſſes, will be deemed good in Chancery, in favour of younger children.

Parker v. Parker, 10 Mod. 467.

§ 9. *A.* having power to charge lands with 7000 *l.* for younger children, by any writing under his hand, atteſted by three witneſſes, did, (in fear of ſudden death and being abſent from home, and ſo not being able to have ſight of the deed where this power was contained), by a paper atteſted by two witneſſes, charge his eſtate with 8000 *l.* inſtead of 7000 *l.*, and this defect was ſupplied.

Cotter v. Layer. 2 P. W. 623. 1 Bro. R. 368.

§ 10. It ſhould, however, be obſerved, that courts of equity will give no aſſiſtance, where both parties are volunteers; for where the queſtion, as to the execution

cution of a power, lies between an appointee under a power, without conſideration, and a remainder-man, the latter having a veſted eſtate, will clearly be entitled againſt the former, unleſs the appointee can ſhow that the intereſt of the remainder-man is diveſted by an actual execution of the power in due form.

Where there is Fraud.

§ 11. With reſpect to the ſecond ground upon which a court of equity will ſupply a defect in the execution of a power, namely, fraud or deceit; as it is one of the principal objects of a court of equity to relieve againſt fraud and deceit, it has long been eſtabliſhed, that where a party intereſted prevents a ſtrict compliance with the circumſtances required in the execution of a power, from immoral motives, there, if the perſon who has the power does any act that plainly evinces his intention to execute it, ſuch act will, in equity, be deemed a good execution of it.

3 Cha. Ca. 89. 92. 122.

Gilb. Cha. 306.

§ 12. Thus, where the remainder-man gets the deed into his poſſeſſion, and will not allow the tenant for life to have a ſight of it; there the tenant for life may execute conveyances, and though he does not purſue the terms of the power, yet equity will relieve, even in favour of a volunteer, becauſe the remainder-man ſhall not take advantage of his own wrong, by withholding from the tenant for life, the ſight of his power.

Where a complete Execution is prevented by Accident.

§ 13. With reſpect to the third ground upon which a court of equity will ſupply a defect in the execution of a power, namely accident; as it is an object of courts

courts of equity to relieve againſt all manner of accidents, even in favour of volunteers, it being unconſcionable for a remainder-man to take advantage of them; therefore it was agreed in *Bath* and *Montague*'s caſe, that if a man makes a conveyance, with a power of revocation, in the preſence of four privy counſellors, and he is ſent by the King to *Jamaica*, where that circumſtance becomes impoſſible, there equity will allow him to revoke without it.

3 Cha. Ca. 68.

But a Non-execution will not be ſupplied.

§ 14. Although we have ſeen that a court of equity will, in many inſtances, aid a defective execution of a power, yet it will never interpoſe in the caſe of a non-execution of a power, which always leaves it to the free will and election of the party to whom the power is given, either to execute it or not. And the intervention of death, between a man's reſolving to execute a power, and his actually executing it, is not of itſelf, even in caſes where the act is of ſuch a nature as a man is under an obligation to perform, a ground for the interpoſition of a court of equity, in favour of the perſon intended to have been benefited by the doing thereof, although ſome ſteps be taken towards completing ſuch intention.

Piggot v. Penrice. Com. Rep. 250. Arundel v. Philpot, 2 Vern. 69.

§ 15. A feme covert having a power of revocation and appointment, and being ſick, wrote a letter to her attorney, who had drawn her ſettlement, deſiring he would prepare a deed to give the inheritance to her niece, and on the back of the letter it was written that the attorney ſhould keep it a ſecret. The attorney, however, communicated this letter to the huſband,

band, and ſeveral delays intervened, during which the attorney, having been examined, ſwore, that when he communicated the letter to the huſband, he did not propoſe any method to the huſband, or uſe any means to prevent the revocation.

The queſtion was, whether this letter amounted to a revocation in equity; and it was decreed that it did not.

§ 16. *A.* having a power of revocation, by any writing under his hand and ſeal; and being deſirous of providing for his daughters, prepared notes in writing, which he declared ſhould have the effect of his laſt will, and which he called inſtruments for his counſel to draw up his laſt will in form. His counſel drew a writing, and had the ſame ingroſſed, leaving blanks for the names of the truſtees. *A.* died before he had executed the will. A bill being exhibited by the daughters for the portions given them by theſe inſtructions, an iſſue was directed to try whether theſe notes were part of the laſt will of *A.*; and a verdict was given that they were a will; whereupon the Chancellor decreed them to be a good execution of the power.

Smith v. Aſhton, Finch 273. 1 Freem. 308.

§ 17. This caſe has been cited to prove, that a non-execution of a power will be aided in equity, but it is clear from the circumſtance of directing an iſſue to try whether theſe notes amounted to a will, that the court did not think the accident of the father's death, before he had completed his intent towards his

Treat. of Eq. B. 1. ch. 4. ſ. 25.

his younger children, a ſufficient foundation for relief. It therefore directed a trial to aſcertain whether theſe notes were a will; and it being found that they were, the queſtion then was reduced to this, whether the court could relieve the younger children, in reſpect that the will wanted circumſtances which were required by the power, to attend the execution of it; which, as between the younger children and the heir, it certainly would do, the caſe being by the verdict a caſe of a defective execution only.

2 Vern. 465. § 18. In the caſe of *Laſſells* v. Lord *Cornwallis*, the Lord Keeper ſaid, that the Court of Chancery had not gone ſo far, as where a perſon had a power to raiſe money, if he neglected to execute that power, to do it for him; although he thought it might be reaſonable enough, and agreeable to equity, in favour of creditors. But in a modern caſe it was held, that where a perſon had a power of charging lands with 2000 *l.*, which he never executed, the power could not be conſidered as aſſets for payment of debts.

Holmes v. Coghill, 7 Veſ. Jun. 499.

TITLE XXXII.

DEED.

CHAP. XX.

How Powers may be extinguiſhed and deſtroyed.

§ 1. *A complete Execution.*
2. *A Releaſe.*
3. *Fine or Recovery.*
4. *Bargain and Sale, &c.*
5. *Powers in Groſs not barred by a Conveyance of the Land.*
8. *Powers to Leaſe not barred by a Charge on the Land.*
10. *Powers collateral not barred by Releaſe or Conveyance.*
11. *A Power may be merged.*
13. *A Power may be forfeited to the Crown.*
14. *In what Caſes ſuch Power may be executed.*
18. *When a Power becomes void.*

Section 1.

A complete Execution.

THE firſt and moſt obvious mode by which powers, whether relating to the land or collateral to it, may be extinguiſhed, is by a complete execution of them. And it was formerly held, that even a partial execution of a power, operated as an extinguiſhment of it, but this doctrine is not now held to be law.

Zouch v. Woolſton, Ante ch. 16, ſ. 33.

A Releaſe. 1 Inſt. 265 *b.*

§ 2. Powers relating to the land, whether appendant or in groſs, may be barred by a releaſe, to any perſon, having an eſtate in poſſeſſion, remainder, or reverſion, in the lands, to which the power relates: for where powers are given to a perſon having an eſtate or intereſt, either preſent or future, in the land,

the

the exercise of such powers is considered as a species of property advantageous to him, and there is no reason why he should not be allowed to depart with, or exclude himself from the benefit of it.

Fine or Recovery.

§ 3. Powers relating to the land may also be barred or extinguished by fine or common recovery; of which an account will be given under titles Fine and Recovery.

Bargain and Sale, &c. 1 Inst. 342 *b.* n. 1.

§ 4. Powers relating to the land are also liable to be extinguished or suspended by any of those conveyances, which derive their effect from the statute of uses, and which are said to operate without transmutation of possession; as a bargain and sale, covenant to stand seised, and lease and release; for whoever has any estate in the land, may convey that estate to another, and it would be unjust that he should afterwards be admitted to avoid, or to do any thing in derogation of his own act. Any assurance, therefore, of this nature, which carries with it the whole of the grantor's estate, operates as a total destruction of the powers appendant to that estate; and by parity of reason, any assurance that only transfers a particular estate, such as an estate for life, or a term for years, suspends the exercise of the power, during the continuance of that estate, or at least the estate to be raised by it: and where such assurance only creates a charge upon the estate, it necessarily subjects the estate, created by the power, to that charge.

§ 5. With

§ 5. With reſpect to thoſe powers relating to the land, which are called powers in groſs, as the eſtates to be created by them, do not fall within the compaſs of the eſtate, to which they are ſaid to relate, there does not ſeem to be any reaſon why an alteration in that eſtate ſhould affect them. Hence, if a tenant for life, with power to ſettle a jointure, conveys away his life eſtate, by bargain and ſale, covenant to ſtand ſeiſed, or leaſe and releaſe, theſe conveyances will not affect his power of appointing a jointure. If he ſhould even make a conveyance in fee, by any of theſe aſſurances, as it is not their operation to paſs a greater eſtate than the grantor has a right to convey, the power in groſs will not be affected by them.

Powers in Groſs not barred by a Conveyance of the Land.

Hard. R. 416.

§ 6. But where a tenant for life, with a power to jointure, conveys away his eſtate by feoffment, to a ſtranger and his heirs, as this ſpecies of aſſurance not only transfers the eſtate which the feoffor might lawfully paſs, but alſo a tortious fee, it follows that the whole inheritance is deveſted, and the ſeiſin out of which the uſes created by the power were to be ſed, is deſtroyed, by which means the power becomes extinct.

Idem.

§ 7. Where a tenant for life, with powers of leaſing, jointuring, and charging, joins with the remainder man in ſuffering a common recovery, the conveyance to make a tenant to the *præcipe* ought to be during the joint lives of the tenant for life, and the intended tenant to the *præcipe;* in order to preſerve the powers of

1 Inſt. 203 *b.* n. 1.

of the tenant for life, by leaving the reverſion in him.

Powers to Leaſe not barred by a Charge on the Land.

§ 8. In ſome caſes, a power of leaſing reſerved to a tenant for life, will not be extinguiſhed or ſuſpended by his conveyance of the eſtate, where ſuch conveyance is made only to create a particular charge, and does not amount to a departing with the whole eſtate.

Ren v. Bulkely, Doug. Rep. 292.

§ 9. Lord *Onſlow* being tenant for life, under his marriage ſettlement, with a power to make leaſes for twenty-one years, reſerving the beſt rent, conveyed all his life eſtate by leaſe and releaſe, to one *Briſcoe* and his heirs, in truſt to apply the profits in payment of an annuity of 150*l.* during the life of Lord *Onſlow*, and the ſurplus to Lord *Onſlow* himſelf.

In the year following Lord *Onſlow* conveyed all his eſtate to truſtees for ninety-nine years, if he ſhould ſo long live, for payment of his debts, but with an expreſs reſervation as to all leaſes granted or to be granted.

Lord *Onſlow* afterwards made a leaſe of the premiſes in queſtion, for twenty-one years, purſuant to his power, and the queſtion was, whether the conveyance to *Briſcoe* deſtroyed the power of leaſing.

Lord *Mansfield*:—"Powers came into the courts "of common law with the ſtatute of uſes, and the "conſtruction

" conſtruction of them, by the expreſs direction of " the ſtatute, muſt be the ſame as in courts of equity. " The creation, execution, and deſtruction of them, " depend on the ſubſtantial intention and purpoſe of " the parties. It is ſaid, firſt, that the grantor in this " caſe was not in poſſeſſion, and that it was neceſſary " he ſhould be to execute the power. But I think " poſſeſſion here means the receipt of the rents and " profits which were applied to his uſe. If actual " poſſeſſion were neceſſary, a leaſing power could " never be executed, where the land is in the hands " of a tenant. Secondly, it is contended that by " granting away his life eſtate, he extinguiſhed his " power. Certainly where the whole life eſtate is " conveyed away by the intention of the parties, the " power muſt be at an end, and cannot afterwards be " exerciſed to the prejudice of the grantee. But the " conveyance here was only to let in a particular " charge, ſubject to which the rents and profits ſtill " belonged to Lord *Onſlow*, and the leaſe could not " prejudice the ſecurity, nor the remainder man, for " the beſt rent muſt be reſerved; it would therefore " be contrary to the intention of all parties, to hold " that the power was extinguiſhed, by the conveyance " to *Briſcoe*."

§ 10. Powers collateral to the land cannot be releaſed, nor are they extinguiſhed or deſtroyed by a feoffment, fine, or recovery; for theſe powers being given to ſtrangers, they are intended for the benefit of ſome third perſon, and therefore the extinction of them is ſuppoſed to be injurious to that perſon. And

Powers collateral not barred by Releaſe or Conveyance. 1 Inſt. 265 *b.* 342 *b. n.* 1.

although it is a general rule of law, that every perſon who is a party to a feoffment, fine, or recovery, is thereby eſtopped from claiming any eſtate or intereſt in the lands ſo conveyed, yet if the donee of a collateral power, conveys the eſtate, over which the power is given, by feoffment, fine, or recovery, and afterwards executes his power of revocation, it will be good. For the perſon claiming the eſtate under the revocation, is in immediately by, and makes his title directly from the original ſettler: he is not therefore bound or eſtopped by any act of the perſon to whom the power is given. Thus, by the old law, if *ceſtui que uſe* deviſed that his feoffees ſhould ſell his land, and died, and his feoffees made a feoffment over, yet it was held that the feoffees might ſell againſt their own feoffment, becauſe the power to ſell was merely collateral to the right of the land, and the vendee took nothing by the feoffment.

A Power may be merged.

§ 11. A power given to a perſon having a particular eſtate in the land, may be merged by his acquiſition of the fee ſimple.

Croſs v. Hudſon, 3 Bro. R. 30.

§ 12. Thus, where an eſtate was limited to *John Hay* for life, remainder to his wife for life, remainder to the children of the marriage in tail, remainder to the ſurvivor of the huſband and wife in fee. With a power to the huſband, by deed or will, to charge the lands with a rent. There was no iſſue, and the huſband in the lifetime of his wife, by will, reciting the power, deviſed in execution of his power, and of all other powers, a rent of 100 *l.*, and ſurvived his wife.

Lord *Thurlow* ſaid, the power was merged, but he was alſo of opinion, that though the power was gone, and the will purported to be an execution of the power, yet as he evidently meant the charge ſhould take place on the eſtate at all events, it muſt be ſuſtained as a charge on the eſtate, out of the intereſt he had at his death.

A Power may be forfeited to the Crown. Gilb. Uſes, 146. 2. Hawk. P. C. c. 49. ſ. 26.

§ 13. A power of revocation may in ſome caſes be forfeited to the King, by an attainder for high treaſon, and by that means become veſted in the crown. Thus, if there be tenant for life with power of revocation over the eſtates in remainder, and ſuch tenant for life is attainted of high treaſon, his eſtate for life, and power of revocation, will be both forfeited.

In what Caſes ſuch Power may be executed.

§ 14. In ſuch a caſe, if the execution of the power of revocation, be attended with circumſtances inſeparably annexed to the perſon of him to whom the power is given, the King cannot execute ſuch power.

Duke of Norfolk's Caſe, 7 Rep. 13 *a.*

§ 15. *Thomas* Duke of *Norfolk* conveyed his lands to truſtees, to the uſe of himſelf for life, remainder to the uſe of *Philip* Earl of *Arundel* his eldeſt ſon in tail, with ſeveral remainders over; with a proviſo that it ſhould be lawful for him to revoke thoſe uſes, by any writing under his proper hand, and ſubſcribed by three witneſſes. The Duke was afterwards attainted of high treaſon, and it was determined, that this power of revocation, although forfeited, could not be executed by Queen *Elizabeth;* becauſe the circumſtances preſcribed in the execution of this power,

Smith v. Wheeler, 1 Freem 9. 1 Vent. 128. 1 Lev. 279.

were ſo inſeparably annexed to the perſon of the Duke of *Norfolk*, that no one but the Duke himſelf could execute them.

§ 16. But if the execution of a power of revocation, be not attended with circumſtances inſeparably annexed to the perſon, to whom the power is given; then in caſe of an attainder for high treaſon, the power of revocation may be executed by the King.

Engleſield's Caſe, 7 Rep. 11. 4. Leon. 135. Vide 1 Hale P. C. 246. 244.

§ 17. Sir *Francis Engleſield* in the firſt of Queen *Elizabeth*, left the kingdom by licence from the Queen, and remained abroad beyond the time of his licence. The Queen, by her warrant under the privy ſeal, required him to return, and upon his not complying, ſeiſed his lands. Sir *Francis Engleſield* by indenture (ſealed at *Rome*) between him and *Francis Engleſield* his nephew, covenanted for the advancement of his blood, *&c.* to ſtand ſeiſed to the uſe of himſelf for life, remainder to the uſe of his ſaid nephew, and the heirs male of his body, remainder to the uſe of the right heirs of his nephew, with a proviſo, that as his nephew was an infant, ſo that his proof was not then ſeen, and becauſe the uncle did not think convenient to ſettle the ſaid inheritance in the nephew abſolutely, ſo long as the uncle ſhould live; therefore, if the uncle by himſelf, or by any other, ſhould during his natural life, deliver or offer to the nephew a gold ring, to the intent to make void the uſes, then all the uſes ſhould be void.

Sir

Sir *Francis Englefield* was afterwards indicted for high treaſon, for compaſſing the Queen's death, on which he was outlawed: and in 28 *Eliz.* an act of attainder for high treaſon was paſſed againſt him. Queen *Elizabeth*, by letters patent, reciting the ſettlement and power of revocation, on tender of a gold ring, appointed two perſons to deliver a gold ring to *Francis Englefield*, which he refuſed.

The queſtion was, whether this tender of a gold ring to *Francis Englefield*, was a good revocation of the uſes.

It was argued that the execution of this power was not given to the Queen by the act of attainder, becauſe it was inſeparably annexed to the perſon of Sir *Francis Englefield*; for although the tender of a ring was a thing that might be done by any perſon, yet as that circumſtance was only a mark of the intention of Sir *Francis Englefield*, which intention muſt ariſe from the opinion he himſelf ſhould form of his nephew's future diſpoſition and conduct, therefore no perſon but Sir *Francis* himſelf could direct the tender of the ring: But the Judges held, that the whole force and effect of the power of revocation depended on the tender of the ring, ſo that the Queen might lawfully execute the power; and therefore judgment was given for her Majeſty.

Lord *Coke* obſerves, that the counſel of *Francis Englefield* were not ſatisfied with this judgment, and therefore adviſed a writ of error; but at the next parliament

Vide Hardwin v. Warner, 2 Roll. R. 393.

parliament a ſpecial act was paſſed to eſtabliſh the forfeiture in the Queen.

When a Power becomes void.

§ 18. Where there is no object for the execution of a power, it of courſe becomes void.

Roe v. Dunt, 2 Wilſ. R. 336. Doe v. Denny, Id. 337. Madoc v. Jackſon, 2 Bro. R. 588.

§ 19. Thus, where a perſon had a power given him by his marriage ſettlement, to appoint the lands to the children of the marriage, and for default of appointment, then to all the children equally, and there was but one child, an appointment to that child was held to be void, becauſe he took under the limitation in the ſettlement,

TITLE XXXII.

DEED.

CHAP. XXI.

Of regiſtering and inrolling Deeds.

§ 2. *Regiſter Acts.*
5. *Circumſtances required in Memorials.*
6. *Utility of the Regiſter Acts.*
7. *An Appointment muſt be regiſtered.*
9. *Regiſtering an Aſſignment is not a Regiſter of the Leaſe.*
§ 11. *Regiſtering is not Notice.*
16. *Notice takes away the Effect of regiſtering.*
21. *But the Notice muſt be fully proved.*
25. *Of inrolling Deeds.*

Section 1.

BY the common law, every deed took place according to the priority of its date or delivery; in conſequence of which, purchaſers and mortgagees were frequently defrauded by means of prior conveyances, with which they were unacquainted.

§ 2. To remedy this inconvenience, it has been enacted, that a memorial of all deeds and conveyances of or concerning, and whereby any honours, manors, lands, tenements, or hereditaments, in the county of *Middleſex*, and in the eaſt, weſt, and north ridings of the county of *York*, may be any way affected in law or equity, may be regiſtered in offices eſtabliſhed for that purpoſe in the county and ridings above mentioned; and that every ſuch deed or conveyance ſhall be adjudged fraudulent and void, againſt any ſubſe-

Regiſter Acts. 2 & 3 Ann, c 4. § 1. 5 Ann, c. 18. 6 Ann, c. 35. 7 Ann, c. 20. 8 Geo. 2. c. 6.

quent purchaſer, or mortgagee, for a valuable conſideration, unleſs a memorial thereof be regiſtered, before the regiſtering of the memorial of the deed or conveyance, under which ſuch ſubſequent purchaſer or mortgagee ſhall claim.

2 & 3 Ann, c. 4. ſ. 16.

§ 3. In the ſtatute, which eſtabliſhes a regiſter in the weſt riding of *Yorkſhire*, there is an exception of copyhold eſtates, leaſes at rack-rent, and leaſes not exceeding 21 years, where the actual poſſeſſion goes along with the leaſe. And in the ſtatute, which eſtabliſhes a regiſter in *Middleſex*, there is an exception of copyhold eſtates, leaſes at rack-rent, and leaſes for 21 years, where the actual poſſeſſion goes along with the leaſe, and alſo of chambers in Serjeant's Inn, the Inns of Court, or Inns of Chancery.

7 Ann, c. 20.

§ 4. It is further enacted by the ſtatutes 5 *Ann*, c. 18. ſ. 4. and 6 *Ann*, c 35. ſ. 19., that no judgment, ſtatute, or recognizance, ſhall affect or bind any honours, *&c.* in the ſaid county or ridings, but only from the time that a memorial of ſuch judgment, ſtatute, or recognizance, ſhall be entered at the regiſter office of ſuch county or ridings.

Circumſtances required in Memorials.

§ 5. It is required by theſe ſtatutes, that the memorials to be regiſtered ſhall contain the day of the month and the year, when ſuch conveyance or deed bears date, and the names and additions of all the parties to ſuch deed or conveyance, and of all the witneſſes, and the places of their abode; and ſhall expreſs or mention the honours, manors, lands, tenements, and hereditaments

hereditaments contained in ſuch deed, and the names of all the pariſhes, townſhips, hamlets, precincts, or extra-parochial places within the ſaid county, where any ſuch honours, manors, lands, tenements, or hereditaments, are lying or being, that are given, granted, conveyed, or any way affected or charged by any ſuch deed or conveyance, in ſuch manner as the ſame are expreſſed or mentioned in ſuch deed or conveyance, or to the ſame effect.

Utility of the Regiſter Acts.

§ 6. The utility of the regiſter acts is proved to a demonſtration by two facts, namely, that lands in regiſter counties bear a higher price, and money is lent on the ſecurity of thoſe lands at a lower rate of intereſt, than on lands ſituated in counties where there is no regiſter. It is, therefore, ſurpriſing, that the Legiſlature, with ſuch proof before them, do not extend the regiſter acts to all the counties in the kingdom. The reaſon uſually given, is, that the landholders object to diſcloſe the ſituation of their eſtates to the public: but, in point of fact, there is very little diſcloſure in a memorial drawn according to the rules preſcribed by the regiſter acts; as the nature of the deed, its conſideration, and uſes, need not be ſtated in the memorial. Nor does there appear to be any neceſſity for inſerting more circumſtances in a memorial than thoſe, which are poſitively required by the regiſter act: for every perſon, deſirous to purchaſe or take a mortgage of lands ſituated in the regiſter county, may know to a certainty, by means of a regiſter, what conveyances have been made of thoſe lands which can affect him. And, if he afterwards purchaſes or advances

vances money on them, without requiring the production of thoſe deeds, it is his own fault, and he has no right to expect any redreſs.

An Appointment muſt be regiſtered.

§ 7. An appointment under a power, is conſidered as a conveyance within the regiſter acts; and, if not regiſtered, will be poſtponed to a ſubſequent mortgage duly regiſtered.

Scrafton v. Quincy, 8 Veſ. 413.

§ 8. The plaintiff came into court under a mortgage deed in *September* 1749, to be paid 500 *l.*, advanced by him to *Thomas Robertſon*, and intereſt, or to have the eſtate ſold and to be paid thereout.

The objection thereto was, that *Robertſon* had no power to convey to the plaintiff, becauſe he had before properly conveyed or appointed the premiſes for the benefit of others; for that, by deed and fine in 1742, this eſtate was ſettled to the uſe of him and his wife, and, afterwards, to ſuch uſes as he and ſhe, or the ſurvivor, ſhould by deed or will appoint. This power was, by a deed in 1744, executed by the huſband and wife, and appointments were made therein for the benefit of the defendants, who therefore claimed prior to the plaintiff's mortgage in 1746.

It was anſwered, that the appointment of the uſes of that deed and fine could not be ſet up againſt the plaintiff, becauſe the premiſes lay in *Middleſex*, where there was a regiſter act; in conſequence of which, this deed of 1744 would be void againſt the plaintiff, as not being regiſtered till 1748, whereas, his incumbrance

brance was regiſtered in 1746, immediately after the date.

For the defendants, it was argued, that this deed in 1744, was not of ſuch a nature as was required by the ſtatute to be regiſtered: the defendant, therefore, had a prior title.

Maſter of the Rolls.—Conſider the intent and meaning of the act. This caſe is clearly within the miſchief recited: for, here is a perſon in 1746 lending out his money on land ſecurity; and what is to defeat him, is a deed in 1744, prior to him. He is clearly the very perſon intended; being, by a ſecret or pocket deed, to be defeated of the incumbrance he has advanced his money for, and taken care to regiſter. He uſed all due diligence required by the ſtatute, and is, therefore, *primâ facie*, entitled to the relief prayed. Next, conſider whether the deed or inſtrument is of ſuch a nature, as to be within the proviſion of this act. The words are general, "all deeds and conveyances." This is undoubtedly a deed; was executed as ſuch, and conveys, ſo as to affect lands, tenements, and hereditaments; becauſe thoſe claiming under the power, claim under a deed, which, as far as it can operate, affects lands, *&c.* But it is ſaid, this deed is not to be conſidered as a ſeparate conveyance, but only as the execution of a power; and that all of it ariſes under the deed of 1742. If that conſtruction were to prevail, there would be an end of the regiſtry, and of the act of parliament: for, by this means, a ſecret deed might be ſet up to defeat him. This, then,

then, being a conveyance actually affecting the lands, though in virtue of a preceding power in another deed, is within the intent of the ſtatute, and, to the moſt common underſtanding, ſuch a conveyance as ought to have been regiſtered: otherwiſe an innocent perſon, induced to lend his money on land-ſecurity, would be defeated. The plaintiff is, therefore, to be conſidered as a prior incumbrancer.

Regiſtering an Aſſignment is not a Regiſter of the Leaſe. Honeycomb v. Waldron, 2 Stra. 1064.

9. The regiſtering an aſſignment of a leaſe will not operate as a regiſter of the original leaſe.

§ 10. The defendant claimed under a leaſe made in 1730 by Lord *Grandiſon*, which was ſoon after mortgaged, and, in 1731, ſold out and out to the defendant. The original leaſe was not regiſtered; but the firſt mortgage of it and the defendant's purchaſe were. And, it not being a leaſe at rack-rent, the queſtion was, whether this was a regiſtry within the meaning of *7 Ann*, c. 20.: and the Chief Juſtice held it not to be ſufficient; for the act ſays, the deed under which the party claims, with the witneſſes names, ſhall be regiſtered; and of this, a ſubſequent purchaſer can have no notice by the bare regiſtry of the aſſignment; and it is alſo required, that the original be produced to the officer.

Regiſtering is not Notice. 2 Atk. 175.

§ 11. It appears to have been the intention of thoſe who framed the regiſter acts, that the regiſtering a memorial of a deed, purſuant to theſe acts, ſhould operate as notice of ſuch deed to all perſons whatever; and that, in all caſes of regiſtry, which is a public depoſitory

poſitory for deeds, and to which any perſon may reſort, a purchaſer ought to ſearch, or be bound by notice of the regiſtry, as he would of a decree in equity, or a judgment at law.

The courts of equity have, however, adopted a very different conſtruction of the regiſter acts; and have determined, that the regiſtering a memorial of a ſecond mortgage, is not conſtructive notice to the firſt mortgagee, who may, therefore, advance more money on the firſt mortgage.

§ 12. *A.* lent money on lands, the mortgage being duly regiſtered, and, afterwards, *B.* lent money on mortgage on the ſame ſecurity, and his mortgage was alſo regiſtered: and then *A.* advanced a further ſum on the ſame lands, without notice of the ſecond mortgage. It was held by Lord Chancellor *King*, that the regiſtering of the ſecond mortgage was not conſtructive notice to the firſt mortgagee before his advancement of the latter ſums: for, though the ſtatute avoided deeds not regiſtered, as againſt purchaſers, yet it gave no greater efficacy to deeds that were regiſtered, than they had before. Bedford v. Backhouſe, Rigge on Regiſt. 6.

§ 13. *Wrightſon* advanced 800 *l.* on a mortgage in *Yorkſhire*, and regiſtered his mortgage, and, afterwards, *Hudſon* lent a ſum of money, and took a judgment for it, which was regiſtered; and then *Wrightſon* advanced 270 *l.* more, but without any expreſs notice of *Hudſon's* judgment; though it was argued on a bill, brought by *Wrightſon* to foreclose, that *Hudſon* ought Wrightſon v. Hudſon, Rigge on Regiſt. 6.

to redeem upon paying the *firſt* mortgage: for that, where ſuch regiſters prevail, every incumbrance ſhould be ſatisfied according to the priority of its regiſtry; and that the regiſtering of *Hudſon*'s judgment was a conſtructive notice to *Wrightſon*, ſufficient to deprive him of the common benefit of a court of equity, whereby a firſt mortgagee without notice is to hold, till ſubſequent incumbrances are diſcharged.

Yet it was reſolved, that theſe ſtatutes avoid only prior charges not regiſtered, but did not give ſubſequent conveyances any further force againſt prior ones regiſtered, than they had before. That, to have affected Mr. *Wrightſon*, *Hudſon* ought to have given him notice when he advanced his money, and that though *Wrightſon* might have ſearched the regiſter, he was not bound to do it: and, therefore, it was decreed, that *Hudſon* and the mortgagor ſhould be foreclоſed, unleſs they paid off both plaintiff's ſecurities.

Morecock v. Dickins, Amb. 678.

§ 14. One *Wilſon* being indebted to *Morecock*, and having taken a new leaſe of ſome lands, it was agreed by deed, that the leaſe ſhould ſtand as a ſecurity for 800 *l.* and intereſt; and the deed was regiſtered. *Wilſon* afterwards mortgaged the premiſes compriſed in the leaſe to *Dickins*, for 800 *l.*, and delivered him the leaſe.

Dickins had no notice of *Morecok*'s ſecurity at the time he took the mortgage. *Wilſon* became a bankrupt; and *Morecock* filed his bill to be paid the money, agreed to be ſecured on the premiſes, prior to *Dickins*'s mortgage.

mortgage. *Dickins* filed his bill to be paid his mortgage money, or to foreclose.

The question was, whether *Dickins* (though he had not actual notice of *Morecock*'s security, at the time he took the mortgage) should be affected by a constructive notice, arising from the circumstance of the deed being registered at the time.

It was admitted by the counsel for *Morecock*, that *Dickins* having got the legal interest, would be entitled to priority, unless he could be affected by notice. That there was no evidence of actual notice: but it was insisted, that the registration was notice of itself; that, to give the register acts its proper and intended effect, the act of registration ought to act as notice; and it was compared to the case of judgments, of which that first docketed shall have priority. On the other side, it was argued for the defendant *Dickins*, that the registry act was made for one single purpose, to give preference to a purchase-deed registered, to a prior deed not registered: but the act gives no greater efficacy to deeds which are registered than they had before; and the case of *Bedford* v. *Backhouse* was cited for that purpose. That, in the present case, *Dickins*, having got the legal estate, was entitled to be paid before a prior equitable incumbrancer, unless he was affected by notice. That here was no actual notice; and the registration was not constructive notice, according to the above determination.

Lord

Lord *Camden*, Chancellor.—The queſtion is, whether regiſtration is preſumptive notice to all mankind. If this was a new point, it might admit of difficulty; but the determination in *Bedford* v. *Backhouſe*, ſeems to have ſettled it, and it would be miſchievous to diſturb it. The act provides for one ſingle caſe only, that is, to make unregiſtered deeds void againſt regiſtered deeds; but there is no proviſion by the act in a caſe where all the deeds are regiſtered. And yet it becomes a ſerious queſtion, whether a court of equity ſhould not ſay, that in all caſes of regiſtry, which is a public depoſitory for deeds, and to which any perſon may reſort, a ſubſequent purchaſer ought not to ſearch or be bound by notice of the regiſtry, as he would of a decree in equity, or a judgment at law. It is a point in which a great deal of property is concerned, and is a matter of conſequence. Much property has been ſettled, and conveyances have proceeded, upon the ground of that determination. In the caſe of *Vandebendy*, in the Houſe of Lords, the doctrine about dower prevailed; becauſe it had been practiſed in a courſe of conveyance. A thouſand neglects to ſearch have been occaſioned by that determination, and, therefore, I cannot take upon me to alter it. If it was a new caſe, I ſhould have my doubts; but the point is cloſed by that determination, which has been acquieſced in ever ſince.

Tit. 12. c. 3. § 23.

Williams v. Sorrell, 4 Ves. Jun. 389.

§ 15. In a modern caſe, it has been determined, that the regiſtering an aſſignment of a mortgage is not notice.

§ 16. The

§ 16. The courts of juſtice have, in another inſtance, conſiderably weakened the operation of the regiſter acts, by laying it down as a rule, that, where a ſubſequent purchaſer, whoſe deed is regiſtered, had notice of a prior incumbrance at the time of his purchaſe, although the deed, by which ſuch prior incumbrance was created, be not regiſtered, ſuch prior incumbrance ſhall, notwithſtanding, take place of the deed ſo regiſtered: for the object of the regiſter acts being to give notice to ſubſequent purchaſers, if a ſubſequent purchaſer has notice, at the time of his purchaſe, of a prior conveyance, then it is not a ſecret conveyance by which he can be prejudiced, but he is in the ſame ſituation as if theſe acts had never been made: for his notice of the prior conveyance is as ſtrong as if it had been regiſtered, and it is his own folly if he proceeds in his purchaſe.

Notice takes away the Effect of regiſtering.

Cowp. R. 712.

§ 17. The firſt caſe on this ſubject aroſe in *Ireland*, where there is a general regiſter act, ſimilar to thoſe which have been mentioned. Lord *Granard* being tenant for life, remainder to his firſt and other ſons, with power of leaſing, granted a leaſe for three lives, at the rent of 30 *l. per annum*; but it was not regiſtered. His Lordſhip, being greatly in debt, came to an agreement with Lord *Forbes* his eldeſt ſon, by the agency of Mr. *Stewart*, to ſell him his life eſtate, upon Lord *Forbes* paying his father's debts, and ſecuring him an annuity, and a jointure to his wife. The eſtate was accordingly conveyed to two perſons, in truſt for Lord *Forbes*: and it was proved that, during the treaty for the purchaſe, Mr. *Stewart*, Lord *Forbes*'s agent,

Lord Forbes v. Deniſton, 4 Bro. Parl. Ca. 189.

had notice of the leaſe. The conveyance to the truſtees being regiſtered, they brought an ejectment againſt the leſſee, and obtained judgment. The leſſee applied to the Court of Chancery; and, upon proving that *Stewart* had notice of this leaſe at the time of the purchaſe, the Lord Chancellor decreed, that a perpetual injunction ſhould be awarded againſt Lord *Forbes* and his truſtees. From this decree, there was an appeal to the Houſe of Lords of *England*, where it was reverſed as to part; the injunction being reſtrained to the life of Lord *Granard*, but, as to the principal point, the decree was affirmed.

Vide 3 Atk. 653.

Blades v. Blades, 3 Ab. Eq. 358.

§ 18. So, where *William Blades* had deviſed certain lands to his wife for life, and, after her death, to his children. The wife entered, but did not regiſter the will. Afterwards, the heir at law mortgaged the eſtate, and the mortgagee got the deed regiſtered; and, upon a bill brought againſt him, denied notice of the will, but it was proved that he had notice.

The court declared, that his notice of the will, though it was not regiſtered, bound him; and that his getting his own purchaſe firſt regiſtered was a fraud; the deſign of theſe acts being only to give the parties notice, who might otherwiſe, without ſuch regiſter, be in danger of being impoſed on by a prior purchaſe or mortgage, of which they are in no danger, when they have notice thereof in any manner, though not by the regiſtry: and that they would never ſuffer an act of parliament, made to prevent fraud, to be a protection to a fraud.

§ 19. A perſon

§ 19. A perſon purchaſed a term for years in the county of *Middleſex*, knowing that it was chargeable with the payment of an annuity of 40 *l*; and, having regiſtered his own conveyance, he refuſed to pay the annuity, becauſe it was not regiſtered. The Court of Exchequer was of opinion, that the purchaſer was liable to the annuity, although it was not regiſtered, for the ſtatute only intended to give ſuch notice of former incumbrances to purchaſers, that they might not thereby be defrauded. But, if a man knows of his own knowledge, that there is a prior incumbrance, and, notwithſtanding that knowledge, becomes a purchaſer, the ſtatute never was intended to relieve ſuch a perſon, though the firſt incumbrance was not regiſtered; for, where a man purchaſes with notice of a prior incumbrance, he purchaſes with an ill conſcience; and, therefore, his purchaſe will never be eſtabliſhed in a court of equity.

Cheval v. Nicholls, 1 Stra. 654. 3 Atk. 654.

§ 20. The laſt caſe which has been reported on this ſubject, was determined by Lord *Hardwicke*, and is thus ſtated by Mr. *Forreſter*.

The defendant, *Edward Le Neve*, (father of the plaintiffs), in 1718, being poſſeſſed of leaſehold eſtates in *Kent* and *Middleſex*, upon his marriage with his firſt wife, mother to the plaintiffs, in conſideration thereof, and of the eſtate ſhe was poſſeſſed of, by articles, covenanted to ſettle his leaſehold eſtates upon truſtees *and their heirs*, in truſt for himſelf during his life; then, as to ſo much of the premiſes as would amount to the yearly value of 250 *l*., to *Henrietta* his intended wife

Le Neve v. Le Neve, Forreſt. MSS. 3 Atk. 646. 1 Veſ. 64. Amb. 436. S. C.

for life, and as to the ſurplus, for the maintenance of the iſſue; and, after her deceaſe, in truſt as to the whole, for the iſſue of the body of *Edward Le Neve* by *Henrietta* his wife, in ſuch manner as he ſhould by deed or will appoint; and, in default of iſſue, in truſt for himſelf *and his heirs*. In *June* 1719, a ſettlement was made in purſuance of theſe articles; but neither articles nor ſettlement were regiſtered, purſuant to the 7th *Ann*, ch. 20. for regiſtering deeds in *Middleſex*.

The defendant, *Edward*, had iſſue by his firſt wife the two plaintiffs; and, after his wife's death, 16th *November* 1719, he, in conſideration of an intended marriage with the defendant *Mary*, ſettled the ſame eſtate on *Norton* and *Dandrige*, two truſtees, in truſt for himſelf for life; then, as to ſo much as would amount to 150*l. per annum*, to *Mary* his intended wife for life; and then to the iſſue of the marriage. A ſettlement was made, *January* 20th, 1743, purſuant to theſe articles, and both articles and ſettlement were regiſtered purſuant to 7 *Ann*, c. 20.; but, previous to the articles, *Norton*, (one of the truſtees), who was an attorney, and truſted by both parties in preparing the ſettlement, had a copy of the articles made upon the firſt marriage, to take counſel's opinion upon.

The plaintiffs brought their bill againſt *Edward Le Neve* and *Mary* his ſecond wife, and the truſtees in the ſecond articles and ſettlement, and againſt ſome mortgagees of *Edward Le Neve*, to ſet aſide the ſecond articles and ſettlement, upon account of notice of the firſt

firſt to the truſtee, and to have the eſtate diſincumbered from the mortgages made by *Edward Le Neve*.

The court, after having taken time to conſider the caſe, now gave judgment.

Lord Chancellor.—The general queſtion in this caſe is, whether there appears a ſufficient equity for the plaintiffs to ſet aſide the ſecond ſettlement, and to get the better of the legal eſtate; which, by the regiſtry act, is veſted in the truſtees of that ſettlement, for want of regiſtering the firſt articles and ſettlement. This wholly depends upon the point of notice, and is properly to be divided into three queſtions. 1ſt, Whether it appears, that *Norton* was attorney or agent for *Mary Le Neve*, the ſecond wife; 2dly, Whether notice to *Norton* be ſufficiently proved according to the rules of this court; and, 3dly, Whether, if both theſe appear, there be ſufficient to poſtpone the ſecond articles and ſettlement, and to give priority to the firſt, notwithſtanding the regiſtry act.

As to the firſt queſtion, it depends on the admiſſion in Mrs. *Le Neve*'s anſwer, wherein ſhe denies notice of the former ſettlement; but this amounts to no more than a denial of perſonal notice: and ſhe ſays, that *Norton* was attorney or agent for her huſband, but that ſhe conſented he ſhould prepare the marriage articles, ſhe having confidence in him upon her huſband's recommendation. Now, if ſhe confided in *Norton*, it is not material upon whoſe recommendation it was; nor is it material whether he was, or was not, employed by

her huſband. There are two caſes, as to this point of notice, determined by Lord *Cowper:* one is *Brotherton* v. *Hatt*, 2 *Vern.* 574., where it was held, that notice to the ſcriveners, who were agents for all the lenders upon an eſtate, was ſufficient notice to the parties. The other is *Jennings* v. *Moore*, 2 *Vern.* 609., where one *Blincorne* having purchaſed a copyhold eſtate, (with notice of an incumbrance by ſurrender, which had not been preſented at the next court, and ſo void by the cuſtom of the manor), and taken the ſurrender in the name of *Moore*, who paid the conſideration money, and agreed to become the purchaſer; this notice to *Blincorne* was determined to be ſufficient notice to *Moore*, and he was decreed to pay off the incumbrance; though it appeared that he did not employ *Blincorne* to purchaſe for him, or knew any thing of the incumbrance, till after *Blincorne* had agreed and taken the ſurrender in his name; but, his approving the purchaſe afterwards, made *Blincorne* his agent *ab initio*. Theſe caſes prove it not to be material by whom *Norton* was originally employed, if he was truſted by Mrs. *Le Neve*.

As to the ſecond queſtion, it was objected for Mrs. *Le Neve*, that, notice being denied by her anſwer, and proved only by one witneſs, it is not, therefore, proved ſufficiently within the rules of this court. But I take the rule of the court, that, where a fact is denied by an anſwer, it muſt be proved by more than one witneſs, to hold only where the anſwer contains an abſolute denial of the ſame fact, which is proved by the witneſs; but, where there is any difference between the facts, the

the rule does not prevail. In this caſe, the denial is only general; whereas, the bill charges notice to *Norton* and *Dandridge*, the truſtees. This general denial amounts only to a denial of perſonal notice to herſelf, and is a kind of negative pregnant, which may be conſiſtent with notice to her agent. *Norton*, the truſtee, being examined for the plaintiffs, proves, that a copy of the firſt articles was delivered to him, to take counſel's opinion upon, which was probably on occaſion of the ſecond ſettlement; and I take this to be a ſufficient proof of notice within the rule of this court.

The third and principal queſtion is, whether the ſecond articles and ſettlement ſhall be poſtponed to the firſt, notwithſtanding the legal eſtate veſted by the regiſtry of the act, by reaſon of the notice; which I ſhall conſider whether ſufficient or not for that purpoſe, firſt, if it had been perſonal; 2dly, as the caſe is, where notice was given to the agent. The queſtion is of great extent, and depends on the conſtruction of 7 *Ann*, c. 20. By the recital in the preamble of that act, it appears, the intent was, to ſecure purchaſers againſt *prior and ſecret conveyances and fraudulent incumbrances*; ſo that the miſchief, intended to be obviated by the act, aroſe only in reſpect of the ſecrecy of former incumbrances. But, if a perſon has notice of a prior incumbrance, it cannot be ſecret as to him. It was ſaid, that this act intended to eſtabliſh a particular kind of notice, *viz.* by regiſtering the conveyance; but this is only with regard to the legal eſtate, and the act does not take away the equity of the prior incumbrancer, but leaves the queſtion ſtill open as to

him; and the ſubſequent purchaſer, if he had notice, can be in no danger from a *ſecret* conveyance. The preſent caſe has been properly compared to that of the inrolment of bargains and ſales within 27 *Hen.* 8.; which act, though not in the ſame words, is to the ſame effect as that under conſideration. Now, upon that act, if there be a prior bargainee, whoſe deed is not inrolled, and a ſecond, whoſe deed is properly inrolled, if this laſt had notice of the prior deed, the prior ſhall prevail in equity; and, if he has any other conveyance, as a feoffment, or a leaſe and releaſe, the firſt vendee ſhall likewiſe prevail at law. I conſider this regiſtry act upon the ſame footing as the 27 *Hen.* 8., and that it ſhall control only the legal eſtate. The caſe put at the Bar, that if a man employs an attorney to regiſter his deed, which he neglects to do, and, afterwards, gets another conveyance of the ſame eſtate, which he regiſters, the firſt deed ſhall prevail, is material: ſo, if another perſon, not an attorney, purchaſes with notice of a prior incumbrance. Theſe caſes, though clear, and ſtronger than the preſent, ſhew that there may be relief in equity, notwithſtanding the regiſtry act.

Ante f. 17. The caſe of Lord *Forbes* v. *Denniſon*, in the Houſe of Lords, 23d *February* 1722, which came from *Ireland*, where there is an act for a general regiſter, is applicable to this queſtion. There, the late Earl of *Granard* had made a leaſe, which was not regiſtered purſuant to the *Iriſh* act: he and his ſon, the Lord *Forbes*, afterwards made a ſubſequent conveyance to the uſe of Lord *Forbes*, &c. which laſt was duly regiſtered, and carried

the legal eſtate; but an agent of Lord *Forbes* had notice of the leaſe before this conveyance. This cauſe was twice heard in *Ireland*; on the laſt of which hearings before Lord *Middleton*, 17th *February* 1721, he decreed a perpetual injunction againſt Lord *Forbes*, to reſtrain his proceeding againſt the leſſees under the leaſe which was not regiſtered. On hearing the cauſe in the Houſe of Lords, *February* 1722, the decree was reverſed; becauſe Lord *Forbes* diſputed his father the Earl of *Granard*'s power of leaſing for any longer term than during his life. The Lords, therefore, adjudged, that all proceedings againſt the leſſees, (except for breach of covenants), ſhould be ſtayed during the Earl of *Granard*'s life, and then Lord *Forbes* to be at liberty to try his right; ſo that they gave the leſſees full relief as to the regiſtry act, though the other queſtion, as to Lord *Granard*'s power of leaſing, was ſtill left open. In *Blades* v. *Blades*, before Lord *King*, 2d *May* 1727, (*Eq. Ca. Abr.* 358.), a mortgage from an heir at law, who had notice of a will whereby the eſtate was deviſed to another, was decreed fraudulent and void againſt the deviſee, though the will was not regiſtered; which I the rather cite, becauſe Lord *King* generally adhered to the law as much as any perſon that has ſat in this court. There was a caſe of *Chivall* v. *Nicholls* and *Hall*, in *Scacc.* in Lord Chief Baron *Gilbert*'s time, where relief was given againſt the regiſtry act, upon equitable circumſtances; which I mention only as a general authority, that equity may prevail againſt this act, without taking notice of the particular ſtate of that caſe, where actual fraud was charged. But that of *Blades* v. *Blades* went merely on the poi-

Ante f. 18.

Ante f. 19.

of notice; and, in that of Lord *Forbes*, there was notice only to the agent. All theſe authorities prove, that the taking a legal conveyance, after notice of a former, is, in itſelf, a ſpecies of fraud, and takes away the *bona fides* of the ſubſequent incumbrancer, and puts him in *malâ fide:* for, though he knew the firſt conveyance was not legal, yet he knew that the grantor's conſcience was bound by it; and this is within the definition of *dolus malus* by the civil law, *Dig. L.* 4. *Tit.* 3. *de Dolo Malo, L. f. f.* 2.; where *Labeo* defines it, *omnem calliditatem, fallaciam, machinationem ad circumveniendum, fallendum, decipiendum alterum, adhibitam.* This is the true ground of the determinations in all caſes of notice.

If this be ſo as to notice in general, we are next to conſider, whether notice to the attorney or agent be ſufficient. Now, if the ground of the determination be *mala fides*, it is all one, whether it be in the party, or in the agent. It is proved by *Norton*, that the firſt articles were put into his hands to adviſe with counſel; and it is objected, that this may have been a fraud in *Norton*, in colluſion with the huſband, upon the defendant Mrs. *Le Neve*. This may be the caſe; but who ought to ſuffer but the party that truſted *Norton* the agent, and not thoſe who did not truſt him? In the caſe cited of *Brotherton* v. *Hatt*, it is probable the ſubſequent mortgagee was impoſed upon; and ſo, probably, was the purchaſer in *Moore* v. *Jennings:* and, if I ſhould determine this not to be a good notice, it would overturn all the caſes of notice to the agent, who, probably, in all thoſe inſtances, impoſed upon

his

his principal. Here, *Norton* was a truſtee, and privy to the whole tranſaction; and I am, therefore, of opinion, that, both as agent and truſtee, notice to him was good notice to the party; and that this is ſufficient to take the caſe out of the regiſtry act.

The next point is, what relief I ſhall give the plaintiffs. Their intereſt is only contingent; being given them in ſuch manner as *Edward Le Neve* ſhall by deed or will appoint, and no direction how the eſtate ſhall go for want of appointment, but only in default of iſſue, to *Edward* and his heirs; ſo that, if the plaintiffs ſhould die without iſſue in their father's life, their repreſentatives will be entitled to nothing. But, notwithſtanding this, I think the plaintiffs entitled to ſome relief, as the other part of this contingency may happen; and ſhall decree a conveyance to the uſes in the firſt articles.

As to the mortgagees, the bill muſt be diſmiſſed with reſpect to them.

But the plaintiffs are entitled to a decree againſt the father to diſincumber the eſtate.

Decreed accordingly.

§ 21. But unleſs notice of a prior deed or incumbrance be fully proved, and there appear to have been ſome fraud, the Court of Chancery will not give any relief. But the Notice muſt be fully proved.

§ 22. A bill

Hine v. Dodd, 2 Atk. 275.

§ 22. A bill was brought by a judgment creditor to be let in upon an eſtate of one *Proof* and his wife, in *Middleſex*, preferably to the defendant, who was mortgagee of the ſame eſtate, upon a ſuggeſtion, that the defendant had notice of the judgment before the mortgage was executed, and, likewiſe, to enquire into the conſideration of the mortgage.

The judgment was entered upon the 12th of *March* 1733, but not regiſtered till the 12th of *June* 1735.

The mortgage was made the 24th of *May* 1735, and regiſtered *June* the 2d 1735.

Lord Chancellor.—This caſe depends upon the notice the defendant had of the judgment, before his mortgage was regiſtered. The regiſter act, the 7th of *Ann*, c. 20., is notice to the parties, and a notice to every body; and the meaning of this act was, to prevent parol proofs of notice, or not notice. But, notwithſtanding, there are caſes where this court have broke in upon this, though one incumbrance was regiſtered before another; but it was in caſes of fraud: the firſt was an *Iriſh* caſe in the Houſe of Lords, the next was a *Yorkſhire* cauſe before Lord Chancellor *King*. There may, poſſibly, have been caſes upon notice diveſted of fraud, but then the proof muſt be extremely clear.

But though, in the preſent caſe, there are ſtrong circumſtances of notice before the execution of the mortgage, yet, upon mere ſuſpicion only, I will not overturn

overturn a poſitive law. His Lordſhip having obſerved upon the evidence, that there was barely the evidence of a defendant's confeſſion, in contradiction to his anſwer, and contrary to a poſitive act of parliament, made to prevent any temptation to perjury from contrariety of evidence. But what weighed principally with him, was the great danger of overturning an act of parliament, and making it mere waſte paper. To be ſure, apparent fraud, or clear and undoubted notice, would be a proper ground of relief; but ſuſpicion of notice, though a ſtrong ſupicion, is not ſufficient to juſtify the court in breaking in upon an act of parliament. His Lordſhip, therefore, decreed, ſo far as the plaintiff's bill ſought relief, by poſtponing the defendant's mortgage to the plaintiff's judgment, that it ſhould be diſmiſſed with coſts.

§ 23. In a modern caſe, a regiſtered conveyance of premiſes in *Middleſex* for valuable conſideration, was eſtabliſhed againſt a prior deviſe not regiſtered; the evidence of notice, which ought to amount to actual fraud, not being ſufficient. And the Maſter of the Rolls ſaid, he regretted that the ſtatute had been broken in upon by parol evidence; and was very glad to find that Lord *Hardwicke*, in *Hine* v. *Dodd*, ſaid, nothing ſhort of fraud would do.

Jolland v. Stainbridge, 3 Veſ. Jun. 478.

§ 24. Nothing would contribute more to the ſecurity of real property than the eſtabliſhment of a regiſter for deeds in every county in *England*, with a clauſe, that the regiſtering a memorial of a deed, ſhould in all caſes operate as notice of ſuch deed; and that

that no averment ſhould be admitted at law, or in equity, that a perſon claiming under a deed which was regiſtered, had notice of a preceding unregiſtered deed.

Vide 1 Inſt. 290 *b.* *n.* 1. ſ. 11.

Of inrolling Deeds.

§ 25. It is a common practice to inrol deeds for ſafe cuſtody; that is, to get them tranſcribed upon the records of one of the King's Courts at *Weſtminſter*, or of the Court of Quarter Seſſions.

§ 26. Every deed, before it is inrolled, muſt be acknowledged to be the deed of the party, before a judge of the court in which it is to be inrolled, or before a Maſter in Chancery, if intended to be inrolled in the Court of Chancery. This acknowledgment is ſigned by the Judge or Maſter in Chancery, before whom it is acknowledged; and ſuch ſignature is the officer's warrant for inrolling the deed.

2 Lilly's P. Reg. 69.

§ 27. The inrolment of a deed does not make it a record; but it thereby becomes a deed recorded: for there is a difference between a matter of record, and a thing recorded to be kept in memory. A record is the entry in parchment of judicial matters, controverted in a court of record, and whereof the court takes notice: but an inrolment of a deed is a private act of the parties concerned, of which, the court takes no cognizance at the time when it is done.

2 Freem. Rep. 259.

§ 28. Where deeds are inrolled for ſafe cuſtody, the inrolment is evidence only againſt the party who ſealed the deed, and all thoſe claiming under him.

TITLE

TITLE XXXII.

DEED.

CHAP. XXII.

How Deeds may be avoided.

§ 1. *Diſclaimer.*
3. *Erazure or Interlineation.*
7. *Breaking off the Seal.*
9. *Cancelling.*
13. *When Uſurious.*
16. *Of the Statutes 13 and 27 Elizabeth.*
18. *What Conveyances are within theſe Statutes.*
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76. *Voluntary Conveyances are binding on the Party.*
79. *Dureſs.*
81. *Equity avoids Deeds obtained by Fraud.*
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Section 1.

DEEDS may be avoided in ſeveral ways, and for ſeveral reaſons. Thus, in the caſe of a deed poll the grantee may diſclaim the eſtate intended to be given to him, in which caſe no eſtate will veſt in him. But in the caſe of an indenture, if the grantee executes it, he thereby accepts of the eſtate limited to him.

Diſclaimer. Bro. Ab. Done. pl. 7. Diſclaimer, pl. 54. Joint-tenant, pl. 57.

§ 2. It

3 Rep. 26 *b.* Smith v. Wheeler, 1 Vent. 130.

§ 2. It ſhould, however, be obſerved, that a diſclaimer of a freehold eſtate muſt be in a court of record, becauſe a freehold ſhall not be deveſted by bare words in *pais;* but in the caſe of terms for years, which are only chattels real, the aſſignee of them may refuſe in *pais*, and by ſuch refuſal the intereſt will be deveſted.

Erazure or Interlineation. Pigot's Caſe, 11 Rep. 26.

§ 3. A deed may be avoided by erazure or interlineation, and in 12 *Ja.* 1. it was reſolved, that when any deed is altered in a part material, by the plaintiff himſelf, or by any ſtranger, without the privity of the obligee, be it by interlineation, addition, razing, or by drawing a pen through a line, or through the midſt of any material word, the deed thereby becomes void.

7 Rep. 27 *a.*

§ 4. If the obliteration be made by the party who owns the deed, although it be in a part not material, or that it is to the advantage of the other party, and to his own diſadvantage, yet the deed will be rendered void. But if the alteration be made by a ſtranger in an immaterial part, without the privity or conſent of the owner of the deed, it will not render it void.

Fitzgerald v. Fauconberg, Fitz. R. 204.

§ 5. It was held in a ſubſequent caſe, that an interlineation, by which a power of ſale was enlarged, ſhould be preſumed to have been made at the time of the execution of the deed, and not after; if nothing appeared to the contrary.

§ 6. The

§ 6. The modern practice is, when any alteration or razure is made in a deed before it is executed, to take notice of it in the atteſtation.

Breaking off the Seal, Shep. T. 64. Cro. Eliz. 408. 2 Show. 29.

§ 7. It was formerly held, that if the ſeal of a deed was broken off, or ſo defaced that no ſign or print of it could be ſeen (unleſs the perſon who was bound by the deed, did it,) ſuch deed became void. This doctrine is, however, much altered by more modern determinations: for if it appears that the ſeal of a deed has been torn off by accident, or deſtroyed by time, the deed will, notwithſtanding, be deemed valid.

Nichols v. Haywood, Dyer 59 *a.*

Argol v. Cheyney, Palm. 403.

§ 8. The ſeals of a deed to lead the uſes of a recovery were broken off, but it being proved that ſeals were once annexed to the deed, and that they were torn off by a little boy, and the parts torn off being compared with the deed and the razures agreeing, it was held to be valid.

Cancelling, Shep. T. 70.

§ 9. If a deed be delivered up to be cancelled, to the party who is bound by it, and it is accordingly cancelled by tearing off the ſeals, or otherwiſe defacing it; or if the perſon who has the deed cancels it, by agreement with the other party, ſuch deed becomes void.

§ 10. But where an eſtate has actually paſſed by a deed, the cancelling of ſuch deed afterwards will not deveſt any eſtates out of the perſons in whom they were veſted by the deed.

Hudſon's Caſe, Prec. in Cha. 235.

§ 11. A father having quarrelled with his eldeſt ſon, made a ſettlement on his wife of 100 *l.* a year, in augmentation of her jointure. Afterwards, being reconciled to his ſon, he cancelled the deed, and ſo it was found at his death. On a trial at law, the deed being proved to have been executed, was adjudged good, though cancelled.

Bolton v. Carliſle, 2 H. Black. R. 259.

§ 12. Where, in ſetting forth a conveyance, it was ſtated that a deed of releaſe was cancelled by the releaſor's ſeal being taken off and deſtroyed, and that part of the deed was loſt, with a *profert in curia* of the reſidue, it was held to be a good pleading: and Lord Ch. Juſt. *Eyre* ſaid—"I hold clearly that the "cancelling a deed will not diveſt property, which "has once veſted by tranſmutation of poſſeſſion; "and I would go farther, and ſay, that the law "is the ſame with reſpect to things which lie in "grant. In pleading a grant, the allegation is, that "the party at ſuch a time did grant, but if by acci-"dent the deed is loſt, there are authorities enough "to ſhew, that other proof may be admitted. The "queſtion in that caſe is, whether the party did "grant: to prove this the beſt evidence muſt be pro-"duced, which is the deed, but if that be deſtroyed, "other evidence may be received, to ſhew that the "thing was once granted; for God forbid that a "man ſhould loſe his eſtate, by loſing his title-"deeds."

When Uſurious.

§ 13. By the ſeveral ſtatutes againſt uſury, particularly the ſtat. 12 *Ann.* ſt. 2. c. 16. it is enacted, that

no perſon ſhall take, directly or indirectly, for the loan of any monies, wares, merchandiſes, or other commodities whatſoever, above the value of 5 *l.* for the forbearance of 100 *l.* for a year, and ſo after that rate for a greater or leſſer ſum, or for a longer or ſhorter time. And that all bonds, contracts, and aſſurances whatſoever, for payment of any principal money to be lent, whereupon or whereby there ſhall be reſerved or taken, above the rate of 5 *l.* in the hundred as aforeſaid, ſhall be utterly void; and the perſon taking above 5 *l.* for the forbearance of 100 *l.* for a year, ſhall forfeit treble the value of the monies, &c. ſo lent.

§ 14. Theſe ſtatutes do not extend to a purchaſe of annuities for lives, where the purchaſer's principal is, *bona fide*, and not colourably, put in jeopardy, for in that caſe no inequality of price will make it an uſurious bargain. But by the ſtatute 17 *Geo.* 3. c. 26. it is enacted, that upon the ſale of any life annuity of more than the value of 10 *l.* *per annum* (unleſs on a ſufficient pledge of lands in fee ſimple) the true conſideration, which ſhall be in money only, ſhall be ſet forth and deſcribed in the ſecurity itſelf.

§ 15. By the ſtatute 14. *Geo.* 3. c. 79. all mortgages and other ſecurities, upon eſtates or other property in *Ireland*, or the plantations, bearing intereſt, not exceeding 6 *l.* *per cent.*, ſhall be legal, though executed in the kingdom of *Great Britain*; unleſs the money lent ſhall be known at the time to exceed the value of the thing or pledge; in which caſe alſo, to

prevent uſurious contracts at home, under the colour of ſuch foreign ſecurities, the borrower ſhall forfeit treble the ſum ſo borrowed.

Of the Statutes 13 Eliz. c. 5. and 27 Eliz. c. 4.

§ 16. By the ſtatute 13 *Eliz.* c. 5. for avoiding and aboliſhing of feigned, covinous, and fraudulent feoffments, gifts, grants, alienations, conveyances, &c. deviſed or contrived, to the end, purpoſe, and intent, to delay, hinder, or defraud creditors of their juſt and lawful actions, it is declared and enacted, that all and every feoffment, gift, grant, alienation, bargain, and conveyance of lands, &c. to or for any intent or purpoſe before declared, ſhall be deemed and taken (only as againſt that perſon or perſons, his or their heirs, executors, adminiſtrators, and aſſigns, whoſe actions, ſuits, debts, &c. by ſuch fraudulent devices, ſhall be in any wiſe diſturbed, hindred, delayed, or defrauded) to be utterly void.

§ 17. By the ſtatute 27 *Eliz.* c. 4. for the avoiding of fraudulent, feigned, and covinous conveyances, it is enacted, that all and every conveyance, grant, charge, leaſe, eſtate, incumbrance, and limitation, of uſe or uſes, of, in, or out of any lands, tenements, or other hereditaments whatſoever, for the intent and of purpoſe to defraud and deceive ſuch perſon or perſons as ſhall purchaſe in fee ſimple, fee tail, for life or years, the ſame lands, ſhall be deemed and taken, only as againſt all perſons who ſhall purchaſe for money or other good conſideration the ſame lands, &c. to be utterly void and of none effect.

§ 18. The

§ 18. The deeds and conveyances which are rendered void, or affected by theſe ſtatutes, are of three kinds—1ſt, Deeds or conveyances, made with an expreſs intention to defraud creditors or ſubſequent purchaſers. 2d, Deeds or conveyances, made without any conſideration, uſually called voluntary conveyances. 3d, Deeds or conveyances made for good, but not for valuable conſiderations, ſuch as deeds made to provide for a man's wife, children, or relations.

What Conveyances are within theſe Statutes.

§ 19. With reſpect to deeds made with an intent to defraud creditors, or ſubſequent purchaſers, no doubts can ariſe reſpecting their nullity, whenever ſuch an intent can be proved, even though they ſhould be made for a good, or valuable conſideration. And in *Twine's* caſe, the badges of fraud were, 1ſt, The conveyance was of all the grantor's property, without exception of his apparel, or any thing of neceſſity. 2d, The donor continued in poſſeſſion. 3d, The conveyance was made in ſecret. 4th, There was a truſt between the parties. Though in conveyances of land, it is ſaid, in a ſubſequent caſe, that where the conſideration is future, the donor's continuation in poſſeſſion is not fraudulent; unleſs it be expreſsly proved that fraud was intended.

Deeds made with Intent to defraud Creditors and Purchaſers.

3 Rep. 80.

Stone v. Grubham, 1 Roll. R. 3.

§ 20. Lord *Coke* ſays, if a perſon intending to ſell his land, had by fraud conveyed it to the Queen, to the intent to deceive the purchaſer, and afterwards ſold the land to another, for a valuable conſideration, and made a conveyance accordingly; the purchaſer ſhould

11 Rep. 74 *a*.

enjoy the land againſt the Queen; for although the Queen was not excepted, yet the act being general, and made to ſuppreſs fraud, ſhall bind the crown.

Tarback v. Marbury, 2 Vern. 510.

§ 21. *A.* conveyed his eſtate to the uſe of himſelf for life, with power to mortgage ſuch part as he ſhould think fit, remainder to truſtees to ſell and pay all his debts, but continued in poſſeſſion, and kept the deed. Afterwards *A.* became indebted by judgment bond and ſimple contract. It was decreed, that the deed of truſt was fraudulent, as againſt the creditors by bond and judgment, who not having notice of the ſettlement, ſhould not come in, on an average only, with the other creditors.

§ 22. With reſpect to the circumſtances from which an intent to defraud a ſubſequent purchaſer may be collected, the conveyance to ſuch purchaſer has been held ſufficient to ſhew, that there was a fraudulent intent at the time when the firſt conveyance was made; and will therefore invalidate ſuch firſt conveyance, as to the ſubſequent purchaſer.

Buſſell's Caſe, 6 Rep. 72.

§ 23. It was reſolved by Lord *Coke* and the other Judges of the Court of Common Pleas, in 5 *Jac.* that, if a father made a leaſe by fraud and covin, to defraud others, to whom he ſhould ſell it, and died; and the ſon, knowing or not knowing of the leaſe, ſells the land for good conſideration, the vendee ſhould avoid the leaſe by the ſtat. 27 *Eliz.* for it is not neceſſary that the perſon, who ſells the land, ſhould make the former conveyance.

§ 24. Although

§ 24. Although the ſubſequent purchaſer ſhould have notice of the preceding conveyance, yet he will be allowed to invalidate it: for notice cannot make that good, which an act of parliament renders void: and the completion of the purchaſe is neceſſary, to enable the purchaſer to avoid the firſt conveyance under the ſtatute: but this doctrine has been lately queſtioned.

Notice is immaterial. Standen's Caſe, 5 Rep. 60 *b.*

Cowp. R. 711.

Treat. of Eq. B. 1. c. 4. ſ. 13.

§ 25. When the Judges were firſt called upon to expound theſe ſtatutes, they appear to have conſidered all voluntary conveyances, that is, all conveyances made without ſome conſideration, as fraudulent, and conſequently void againſt creditors. But it has ſince been eſtabliſhed, that a voluntary conveyance, made by a perſon not indebted at the time, is not fraudulent; unleſs it ſhould appear to have been made with a view to defraud ſubſequent creditors.

Voluntary Conveyances.

§ 26. Thus, it is ſaid in a note in *Dyer*, that if a man conveys land for preferment of his children, this ſhall be good, if he was not in debt at the time; but if he was in debt, it would be otherwiſe.

294 *b.*

§ 27. Lord *Hardwicke* ſays,—" 'Tis neceſſary on " 13 *Eliz.* to prove, at the making of the ſettlement, " the perſon conveying was indebted at the time, or " immediately after the execution of the deed; or " otherwiſe it would be attended with bad conſe- " quences, becauſe the ſtatute extends to goods and " chattels; and ſuch a conſtruction would defeat

Walker v. Burrows, 1 Atk. 93.

" every proviſion for children and families, though
Infra. " the father was not indebted at the time."

§ 28. But, where a perſon, who is indebted, makes a voluntary ſettlement, it is clearly void as to his creditors, by the ſtatute 13 *Eliz.* And Lord *Hardwicke* has ſaid,—" I have hardly known one caſe, where the
Ruſſel v. Hammond, 1 Atk. 15. " perſon conveying was indebted at the time of the " conveyance, that has not been deemed fraudulent. " There are, to be ſure, caſes of voluntary ſettle- " ments that are not fraudulent: and thoſe are, " where the perſon making is not indebted at the " time, in which caſe ſubſequent debts will not ſhake " ſuch ſettlements."

§ 29. In the caſe of a ſubſequent purchaſer, a voluntary conveyance is conſidered as fraudulent and void, under the 27 *Eliz.* And the ſubſequent conveyance, being for a good or a valuable conſideration, will in all caſes prevail againſt it.

Standen v. Bullock, Toth. 257. § 30. The plaintiff bought ſeveral manors of *T. B.* deceaſed, who before the plaintiff's purchaſe, had conveyed the ſame by fine and recovery, to the defendant and his heirs male; which being done without conſideration, was adjudged and decreed to the plaintiff.

Curſon v. Blackall, Toth. 258, § 31. A father made a voluntary conveyance of land in tail, reſerving an eſtate for life, and afterwards ſold the woods upon the lands to a ſtranger.

It

It was decreed that the purchaſer of the woods ſhould have them, notwithſtanding the conveyance. Leach v. Dean, 1 Cha. Rep. 78.

§ 32. Lord *Hardwicke* ſays,—"There is certainly "a difference between the ſtatute 13 *Eliz.* which is in "favour of creditors, and 27 *Eliz.* which is in "favour of purchaſers. But that difference was "never ſuffered, by way of general rule, to go far- "ther than this. On the 27 *Eliz.* every conveyance "made, where there is a ſubſequent conveyance for "a valuable conſideration, though no fraud in that "voluntary conveyance, nor the perſon making it at "all indebted, yet the determinations are, that ſuch "mere voluntary conveyance is void at law, by the "ſubſequent purchaſe for a valuable conſideration. "But the difference between that and the 13 *Eliz.* is "this: if there is a voluntary conveyance of real "eſtate, or chattel intereſt, by one not indebted at "the time, though he afterwards becomes indebted, "if that voluntary conveyance was for a child, and "no particular evidence or badge of fraud to deceive "or defraud ſubſequent creditors, that will be good; "but if any mark of fraud, colluſion, or intent to "deceive ſubſequent creditors appears, that will make "it void; otherwiſe not, but it will ſtand, though he "afterwards becomes indebted. But I know no caſe "on the 13 *Eliz.* where a man, indebted at the time, "makes a voluntary conveyance to a child without "conſideration, and dies indebted, but that it ſhall "be conſidered as part of his eſtate for benefit of his "creditors." 2 Veſ. R. 10.

§ 33. With

Conveyances for a good Conſideration only.

§ 33. With reſpect to conveyances made for good conſiderations, that is, in favour of a wife, children, or near relations, they are alſo within theſe ſtatutes, and are conſidered as fraudulent, againſt creditors, and ſubſequent purchaſers: for, otherwiſe it would be in the power of any perſon to defraud his juſt creditors, by conveying his eſtate to his children or other near relations. Beſides, there is always a ſtrong preſumption, that conveyances of this kind are attended with a ſecret truſt in favour of the grantors.

Apharry v. Boddingham, Cro.Eliz.350.

§ 34. A conveyance by a perſon, of lands, which deſcended to him from his father, to the uſe of himſelf for life, remainder to his firſt ſon in tail, *&c.* was deemed fraudulent as againſt a bond creditor of the father; the jury having found that the ſon had notice of the debt, before he made the conveyance.

§ 35. Settlements on a wife or children, made after marriage, which are unſupported by any conſideration, or by any agreement made before marriage, are voluntary, and void under the ſtatutes; being only founded on the moral duty which every huſband is under of providing for his wife and children.

Woodie's Caſe, cited Cro. Ja. 158.

§ 36. Thus, where a perſon after marriage aſſigned over a leaſe for years, as a jointure for his wife, and afterwards ſold it. The purchaſer was allowed to avoid the aſſignment as fraudulent.

Goodright v. Moſes, 2 Blackſt. Rep. 1019.

§ 37. *Joſhua Reade* being tenant for life, with remainder to his daughter *Elizabeth* in tail, they joined

in

in levying a fine to truſtees, in truſt for the father for life; and, after his deceaſe, for the maintenance of *Elizabeth* and her children, during the life of *Elizabeth*; and, after the death of *Elizabeth* and her huſband, to raiſe portions for the younger children, remainder to the right heirs of *Elizabeth*.

Elizabeth, having ſurvived her huſband, made a leaſe of the premiſes for twenty-one years, at a rack rent.

Upon an attempt to annul this leaſe, by the heir of *Elizabeth*, it was determined; that the ſettlement was only a voluntary conveyance, within the ſtatute 27 *Eliz.* being founded only on a good, and not a valuable conſideration; and therefore could not be ſet up againſt this leaſe.

§ 38. *Richard Emery* conveyed the premiſes in queſtion, without any conſideration, to the uſe of himſelf for life; remainder to his wife for life; remainder to the iſſue of *R. Emery* and his wife, in tail. Three years after, *R. Emery* and his wife mortgaged the premiſes to one *Staverton* for ſecuring 700 *l.* And it appeared that *Staverton* was told at the time, that the eſtate was ſettled on *Emery*'s wife and children. Chapman v. Emery, Cowp. R. 279.

The queſtion was, whether the mortgagee could avoid this ſettlement, as fraudulent, under the 27 *Eliz.* It was contended, that the ſtatute related only to purchaſers, and that a mortgagee was not a purchaſer; that no circumſtance of fraud appeared,

as

as the ſettlement was three years prior to the mortgage,

Lord *Mansfield* ſaid, that a mortgagee was a purchaſer; and that, in this caſe, the ſettlement was void as to the mortgagee,

Evelyn v. Templar, 2 Bro. R. 148.

Conveyances with Power of Revocation.

§ 39. By the 5th ſection of the ſtatute 27 *Eliz.* it is enacted, that if any perſon ſhall make any conveyance, with a power of revocation, and afterwards ſhall convey or charge the ſame lands for money, or other good conſideration, without revoking the firſt conveyance, then the ſaid firſt conveyance ſhall, as againſt ſuch ſecond conveyance, or charge, be deemed void and of no effect.

Standen v. Bullock, 3 Rep. 82 *b.*

§ 40. Where a man had conveyed lands to the uſe of himſelf for life, remainder to ſeveral others of his blood, with a future power of revocation; and, before the power of revocation began, he, for a valuable conſideration, bargained and ſold the land to another and his heirs: it was adjudged, that this bargain and ſale was within the remedy of the ſtatute; as the intent of the ſtatute was, that ſuch voluntary conveyance, which was originally ſubject to a power of revocation, be it *in præſenti* or *in futuro*, ſhould not ſtand againſt a purchaſer, *bonâ fide*, for a valuable conſideration.

1 Sid. 133.

§ 41. Where a power of revocation is inſerted in a conveyance, which can only be exerciſed with the conſent of perſons who are not under the controul of the

the ſettlor; ſuch conveyance will not be conſidered as within this act.

§ 42. Sir *John Maynard* and his wife, in conſideration of the marriage of their ſon, and of 5000 *l.* portion paid with his intended wife, covenanted with four perſons to levy a fine of lands, which were the eſtate of Lady *Maynard*, to the uſe of Sir *John* for life; remainder to the ſon and his heirs, with a proviſo that it ſhould be lawful for Sir *John* or his wife to revoke the uſes, with the conſent of four perſons, who were parties to the covenant, or the ſurvivors or ſurvivor of them. After Sir *John*'s death, his wife entered, and ſold the eſtate, without any conſent, to a perſon who had notice of the former conveyance. Bullet v. Waterhouſe, 2 Jones 94. 2 Show. 46.

It was reſolved, that this conveyance was not fraudulent within the ſtatute 27 *Eliz.* as it could not be made to deceive a purchaſer, the power of revocation not being exerciſeable at the will and pleaſure (ſuch are the words of the act) of the ſettlor, but was reſtrained by the neceſſity of obtaining the conſent of four perſons, entruſted for the ſon's wife: whereas, in the caſe ſtated in 3 *Rep.* 83 *b.* the conſent ſeemed to be given by a perſon, at the devotion of the ſettlor, and appointed by him.

§ 43. In all modern ſettlements, powers of revocation, ſale, and exchange, are reſerved to the truſtees; leſt, if reſerved to the ſettlor, ſuch ſettlements ſhould Booth's Op. Coll. Jur. V. 1. 426.

be deemed fraudulent againſt purchaſers, within this proviſo in the act.

Who are deemed Purchaſers under the 27 Eliz. 3 Rep. 83 *a.* 2 Atk. 601.

§ 44. With reſpect to the perſons, who are deemed purchaſers under the ſtatute 27 *Eliz.*, it was reſolved in *Twine's* caſe, that no purchaſer ſhould avoid a precedent conveyance made by fraud and covin, but he who was a purchaſer for money, or other valuable conſideration; for, although in the preamble it is ſaid, for money or other good conſiderations, and likewiſe in the body of the act, yet theſe words are to be intended only of valuable conſideration. And this appeared by the clauſe reſpecting powers of revocation: for there it is ſaid, for money or other good conſideration paid or given; where the word *paid* is referred to money, and *given* to good conſideration, which excludes all conſiderations of nature or blood, or the like; and were to be intended only of valuable conſiderations, which might be given; and therefore he only, who made a purchaſe of land for a valuable conſideration, was a purchaſer under this ſtatute.

3 Rep. 83 *b.*

§ 45. In *Twine's* caſe, *Anderſon* ſaid, that a man, who was of ſmall underſtanding, and not able to govern the lands which deſcended to him, and being given to riot and diſorder, by mediation of his friends, openly conveyed his lands to them, on truſt and confidence that he ſhould take the profits for his maintenance; and that he ſhould not have power to waſte and conſume the ſame. And afterwards he, being ſeduced by deceitful and covinous perſons, for a ſmall

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ſum of money bargained and ſold his lands, which were of great value. This bargain, although it was for money, was holden to be out of the ſtatute; which was made againſt all fraud and deceit, and doth not help any purchaſer who doth not come to the land for a good conſideration, lawfully and without deceit.

§ 46. Where a perſon made a leaſe, without receiving any fine, or reſerving any rent, it was reſolved, that the leſſee was not a purchaſer within the ſtatute 27 *Eliz.*, and therefore could not avoid a preceding conveyance. Upton v. Baſſett, Cro. Eliz. 449.

§ 47. It has been held, that marriage is a ſufficient conſideration to eſtabliſh a ſecond conveyance; and to render a prior one fraudulent and void, as againſt ſuch ſecond conveyance. But a conveyance to a man's children, or to his wife after marriage, by way of jointure, will not enable them to avoid a preceding conveyance. Douglas v. Waad, 1 Cha. Ca. 99.

§ 48. In the caſe of *Upton* v. *Baſſett*, *Beaumont*, Juſtice, ſaid, where one made a leaſe for eighty years, without conſideration, and afterwards conveyed the land to his wife for her jointure, after marriage: It was reſolved, that this laſt conveyance was voluntary, and without valuable conſideration; and that the wife could not avoid the former leaſe, by averring that it was fraudulent. Ante f. 46.

§ 49. A mort-

Chapman v. Emery, Goodright v. Moſes, ante.

§ 49. A mortgagee is a purchaſer within the ſtatute 27 *Eliz.*, as alſo a leſſee at a rack rent; and therefore may avoid a preceding conveyance, as fraudulent againſt them,

§ 50. Where the price is inadequate in a conſiderable degree; or, where an apparent inadequacy of price is coupled with other circumſtances, indicating a fraudulent colluſion between the purchaſer and the vendor, to avoid a preceding conveyance, a purchaſer under ſuch circumſtances will not be entitled to the protection of this ſtatute.

Doe v. Routledge, Cowp. R. 705.

§ 51. *William Watſon*, being ſeiſed in fee of certain copyholds, ſurrendered them in 1763, to the uſe of himſelf for life, remainder to his nephew *Routledge* in fee. *Routledge* married ſoon after; and, previouſly thereto, ſhewed a copy of this ſurrender to his wife and her father.

Ten years after the firſt ſurrender, *William Watſon* ſurrendered the ſame premiſes to the uſe of *Hugh Watſon*, who was alſo his nephew, in fee: and by a deed of the ſame date, executed by *William Watſon*, reciting, that *Hugh Watſon*, upon the propoſal and at the requeſt of *William Watſon*, had come to an agreement with *William Watſon* for the abſolute purchaſe of the ſaid premiſes, for the ſum of 200 *l.*; and reciting the ſaid ſurrender in purſuance thereof, *William Watſon* acknowledged the receit of the 200 *l.* from *Hugh Watſon*, in full for the purchaſe of the premiſes, and covenanted with *Hugh Watſon*, that he *William Watſon* was

was owner of the premiſes, and had good right to ſurrender the ſame to *Hugh Watſon* and his heirs.

The 200 *l.* was proved to have been paid at the execution of the deed, and *Hugh Watſon* was admitted. It was alſo proved, that *Hugh Watſon*, before the ſurrender to him, knew of the former ſurrender; and that the premiſes, at the time of the ſurrender to *Hugh Watſon*, were worth from 1800 *l.* to 2000 *l.*

It was contended that the firſt ſurrender, being merely voluntary, was void under the ſtatute 27 *Eliz.* c. 4. in reſpect to the ſecond ſurrender; which was made to a *bonâ fide* purchaſer, and for a valuable conſideration.

Lord *Manſfield* obſerved, that the ſtatute does not ſay, that a voluntary ſettlement ſhall be void, but that a fraudulent ſettlement ſhall be void. There is no part of the act of parliament, which affects voluntary ſettlements *eo nomine*, unleſs they are fraudulent. To be ſure, it is very difficult againſt fair honeſt creditors, to ſupport a voluntary ſettlement. His Lordſhip then cited the caſe of *Newſtead* v. *Searles*. Infra.

On the other ſide it was contended, that the firſt ſurrender, though made in conſideration of love and affection only, was not fraudulent.

Lord *Manſfield*:—One of the queſtions in this caſe is, whether the ſettlement of 1763 is, under all the circumſtances of this caſe, covinous and fraudulent, within the true intent and meaning of the ſtatute

27 *Eliz.* Now, in that ſtatute, there is not a word that impeaches voluntary ſettlements, but as fraudulent and covinous. The title of the ſtatute is againſt covinous and fraudulent conveyances; where nominally one man paſſes, and where nominally his eſtate is conveyed to another; but where in fact it is agreed, that the grantor ſhall keep it to his own uſe, and ſo to anſwer the purpoſes of fraud. The enacting part conſiders it in the ſame light, and makes an expreſs proviſion againſt ſuch practices, as if they were criminal: for it ſays (ſect. 3.) "That all parties to ſuch "fraudulent grants, &c. who ſhall attempt to defend "the ſame, ſhall forfeit one year's value of the land "ſo purchaſed; and alſo, being lawfully convicted, "ſhall ſuffer ſix months impriſonment."

But no perſon, making a voluntary ſettlement, by way of proviſion for his family, was ever conſidered in that criminal light. Where a fraudulent uſe is made of a ſettlement, that indeed may be carried back to the time when the fraud commenced. A cuſtom has prevailed, and been leant to extremely, to conſtrue voluntary ſettlements fraudulent againſt creditors; but, if the circumſtances of the tranſaction ſhew it was not fraudulent at the time, it is not within the meaning of the ſtatute, though no money was paid; for inſtance, what is generally done in marriage ſettlements; if the father upon the marriage of his eldeſt ſon, in a ſettlement upon him, limits remainders to half a dozen younger brothers, after the conſideration of the marriage, thoſe remainders are good within the meaning of the ſtatute againſt any claim of

creditors; and the reaſon is, becauſe it was a good ſettlement at the time.

With reſpect to the deed to *Hugh Watſon*, the queſtion is, whether it be ſuch a deed as is entitled to protection, and ought to ſet the other aſide. In order to do that, it ſhould be a *bonâ fide* tranſaction, and a fair purchaſe in the underſtanding of mankind; or, for a good conſideration, as a ſettlement in conſideration of marriage: and there ſuch a ſettlement would ſet aſide and take place of a former fraudulent deed. It is not neceſſary that it ſhould be for money, but it muſt be a fair *bonâ fide* tranſaction: if it is colourable only, it cannot ſtand. Now, what are the circumſtances of the ſecond ſettlement in the preſent caſe? Manifeſtly a mere contrivance! *Hugh Watſon* has notice of the former ſettlement: *William*, the uncle, had changed his mind. What was to be done to ſet the prior deed aſide? A new one was to be made under ſuch circumſtances, and for ſuch a conſideration as they thought would effectuate the purpoſe. They agree therefore, that all affection was to be left out, no generoſity to appear or be mentioned: but *Hugh Watſon* was *at the requeſt of William*, to agree to give a price which, it is to be ſuppoſed, fully ſatisfied the ſeller. It is a fraud, and no purchaſe at all. The conſideration of 200 *l.* which is to ſupport it as a deed for a valuable conſideration, compared with the real value 2000 *l.*, ſhews it to have been no purchaſe at all, but a gift.—Judgment was given for *Routledge*.

Proviſo in Favour of Conveyances made upon good Conſideration.

§ 52. There is a proviſo in the ſtatute 13 *Eliz.* f. 6. that it ſhall not extend to any eſtate or intereſt in lands made upon good conſideration, and *bonâ fide*, to any perſon or perſons, or bodies politic, not having at the time of ſuch conveyancé any notice of ſuch covin, fraud, or colluſion. And in the ſtatute 27 *Eliz.* f. 4., there is a proviſo, that it ſhall not be conſtrued to impeach any conveyance of lands, made upon good conſideration, and *bonâ fide*.

Settlements in Conſideration of Marriage. Plowd. 58.

§ 53. The conſideration of an intended marriage has always been held to be a valuable one, and, conſequently, ſufficient within this proviſo, to render a conveyance valid againſt creditors and purchaſers.

Kirk v. Clark, Prec. in Cha. 275.

§ 54. A perſon having a reverſion in fee in a copyhold eſtate, ſurrendered it to his eldeſt ſon in tail, remainder to his own right heirs, in order that his ſon, coming in as a purchaſer, ſhould pay a ſmaller fine: afterwards the father, on a treaty of marriage between his ſon and *B.*, told *B.*'s friends that this copyhold was ſo ſettled; and the marriage was had, and a portion of 2000 *l.* was paid. Afterwards the father ſettled the copyhold on a ſecond wife. Lord Chief Juſtice *Cowper* decreed, that the ſurrender to the ſon was good; for, though it was at firſt voluntary, yet, upon the treaty of marriage, it was a principal inducement, and therefore became valuable, and ought to be conſidered as if it had been then ſurrendered to the ſon.

Griffin v. Stanhope, Cro. Ja. 454. 1 Ab. Eq. 354. 1 Vent. 194.

§ 55. Though a ſettlement be executed after marriage, yet, if it is made in conſequence of an agreement

ment entered into before the marriage, or in consideration of an additional portion, it will be as good as if made before marriage.

§ 56. The defendant's father, some time after marriage, in consideration of an additional portion of 100 *l.* paid by his wife's mother, settled an estate of 100 *l.* *per annum* upon himself for life, remainder to his first and other sons, *&c.*: and the mother of the defendant's father, having an interest in this estate, joined with him in the conveyance. Jones v. Marsh, Forrest. 63.

Thirteen years after, the father mortgaged this estate to the plaintiff with the usual covenants, and died.

The question was, whether the settlement should be looked upon as voluntary, and fraudulent against the mortgagee.

Lord *Talbot*.—The question is, whether this be a voluntary conveyance or not? Here is a plain proof that 100 *l.* was paid, the receipt being indorsed on the back of the deed; and, in marriage settlements, things are not to be considered so strictly, there being room for bounty, and every man ought to provide for his wife and family: besides, in this case, that moved from the defendant's father's mother, and she may, in some respect, be considered as a purchaser of the limitations made to her grandchildren; so that it would be very hard to call this a fraudulent settlement, since it is in consideration of a marriage had, and of an additional portion of 100 *l.* paid by the wife's relations,

[illegible] Ch. xxii. § 31—35.

[illegible] § 31. [illegible] 13 Eliz. [illegible] and [illegible] any estate or interest in [illegible] made upon good consideration, and bona fide, to [illegible] or strangers, not having at [illegible] any notice of such co[illegible] and by 27 Eliz. [illegible] shall not be construed to [illegible] conveyance of lands, made upon good [illegible] and bona fide.

3 Cha. Rep. 66.

[illegible] § 32. The consideration of an intended marri[illegible] is a valuable one, and, co[illegible] sufficient within this statute, to render a co[illegible] void against creditors and purchasers.

[illegible] § 33. A person having a reversion in fee in a copy[illegible] hold estate, surrendered it to his eldest son in tail, [illegible] surrender it to such eldest heirs, in order that his son [illegible] might, as a purchaser, hold pay a smaller fine; [illegible] the father, on a treaty of marriage between [illegible] and J. S. that J. S. should that this copyhold was [illegible] settled, and the marriage was had, and a portion [illegible] was paid. Afterwards the father settled the [illegible] on a second wife. Lord Chief Justice Cowper [illegible] that the surrender to the son was good; [illegible] though it was at first voluntary, yet, upon the [illegible] of marriage, it was a principal inducement, and [illegible] became valuable, and ought to be considered as if it had been surrendered to the son.

[illegible] § 34. Though a settlement be executed after mar[illegible] riage, yet, if it is made in consequence of an agree[illegible] ment

[illegible] before the [illegible] of a additional provision, it will be as good as if [illegible] before marriage.

36. The defendant's father, [illegible] in consideration of an additional portion [illegible] by his wife's marriage, [illegible] upon himself for [illegible] other sum, [illegible] father, having [illegible] him in the covenant.

[illegible] the plaintiff [illegible]

The question was [illegible] ded upon as voluntary, [illegible] engagge.

Lord Talbot.—The [illegible] Voluntary consideration [illegible] but 100 l. was [illegible] ck of the [illegible] not to be [illegible] bounty, [illegible] life and [illegible] from the [illegible] some respect, [illegible] mitations made [illegible] be very hard [illegible] it is in [illegible] distinct person [illegible]

which cannot be called voluntary againſt a mortgage made 13 years after.

Brown v. Jones, 1 Atk. 188.

§ 57. *Roger Williams* made a ſettlement in conſideration of a marriage already had, and a portion of 1000 *l.* paid to him by his wife's brother, by which he limited his eſtate to himſelf for life, remainder to his wife for a jointure, remainder to truſtees for 99 years, remainder to his firſt and other ſons in tail male.

The huſband became a bankrupt, and the queſtion was, whether this ſettlement was good againſt his creditors.

Lord *Hardwicke* ſaid, it was admitted, if a ſettlement was made before marriage, though without a portion, it was good; for marriage itſelf was a conſideration. And it was equally good, if made after marriage; provided it was upon payment of money as a portion, or a new additional ſum of money, or even an agreement to pay money, if the money was afterwards paid purſuant to the agreement. This was allowed, both in law and equity, to be ſufficient to make it a good and valuable ſettlement.

His Lordſhip decreed it to be a good ſettlement againſt the creditors, except as to the huſband's life eſtate, and that the term of 99 years ſhould attend the inheritance.

Stileman v. Aſhdown, 2 Atk. 477.

§ 58. In a ſubſequent caſe, Lord *Hardwicke* ſaid, that a ſettlement, though made after marriage, yet being

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ing in conſideration of a portion, which (for any thing that appeared) was paid at the time, could not be impeached by ſubſequent creditors.

§ 59. In another caſe, where a ſettlement was made after marriage in conſideration of a portion paid, and of the covenants and agrrements after mentioned, Lord *Hardwicke* ſaid,—" As to the firſt objection, this ſettlement was made after marriage; but there are many ſettlements and articles after marriage, which have been on good conſideration decreed to be performed in this court, and after a length of time. But it is farther ſaid to be voluntary: for, though it is rightly admitted that, if a portion is paid, it will make it equal to a ſettlement before marriage, yet it is ſaid this cannot be ſo; but the words of the ſettlement do not import that, on which this objection is founded: for it is alſo in *conſideration of the covenants, grants, and agreements, after mentioned;* and, if they had agreed before marriage in that manner, that would have connected the one with the other, and made a good conſideration: ſo that it appears a ſettlement made for conſideration agreed on between the parties at that time. Ramſden v. Hylton, 2 Veſ. 304.

" As to the next objection, it is not in every caſe, that, ſuppoſing the portion is not paid, the iſſue of the marriage ſhall not have the benefit of the uſes of the ſettlement or articles, becauſe the iſſue of the marriage take from both parties; and whether they perform the agreement among themſelves, may be immaterial to the iſſue; and ſeveral decrees have

" paſſed on that foundation; they being purchaſers " under both, and, conſequently, both are obliged to " perform. But there is no occaſion to enter into " that, for I am ſatisfied the portion was paid; and I " wonder they have made ſo much proof of it at this " diſtance of time; and then it appears to be for va- " luable conſideration."

§ 60. Where a wife joins with her huſband in deſtroying the ſettlement made on her marriage, and a new ſettlement is made, ſuch new ſettlement will be good, though a better proviſion is made for the wife and children, than was contained in the original ſettlement.

Scott v. Bell, 2 Lev. 70.

§ 61. Sir *R. Bell*, upon his marriage, ſettled certain eſtates on himſelf for life, remainder to his wife for her jointure, remainder to the firſt and other ſons of the marriage in tail, remainder to his own right heirs. Sir *R. Bell* having afterwards contracted debts, and there being no iſſue of the marriage, his wife joined him in a fine of the ſettled eſtates; and they were ſold. Sir *R. Bell* covenanted to ſtand ſeiſed of other eſtates to the ſame uſes as thoſe contained in the ſettlement.

It was reſolved by Lord *Hale*, and the other judges, that the ſecond ſettlement was good and valid againſt ſubſequent creditors; for, the old ſettlement being deſtroyed, and the new one made the ſame day, an agreement by the huſband to make the new ſettlement, in conſideration of the wife's having joined in the fine

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to deſtroy the old ſettlement, would be preſumed; and this conſideration ſhould extend to all the limitations in the new ſettlement, although the eſtates compriſed in the new ſettlement were nearly double the value of thoſe contained in the old one.

Vide Brill v. Burnford, Prec. in Cha. 113.

§ 62. It was determined, in the following modern caſe, that a ſettlement made before marriage, in conſideration of the marriage, and of a marriage portion, by a perſon who was indebted at the time, was good againſt creditors.

§ 63. Lord *Montfort*, by ſettlement before his marriage, in conſideration of ſuch marriage, conveyed all his houſehold goods, together with his lands, to truſtees in ſtrict ſettlement. It was proved, that at the time of the ſettlement, it was known that Lord *Montfort* was in debt; but he thought the fortune of the lady he was to marry, which amounted to 10,000 *l.* was amply ſufficient to pay all the debts he owed at that time, and had no idea of diſappointing any creditor. *Kennett*, who was a judgment creditor of Lord *Montfort* at the time of his marriage, took thoſe goods in execution; and the truſtees in the ſettlement brought an action of trover againſt him for them. The cauſe was tried; and a caſe was reſerved for the opinion of the Court of King's Bench,

Cadogan v. Kennett, Cowp. 433.

Lord *Mansfield*.—"The queſtion, in this caſe, is, "whether the plaintiffs, who are truſtees under the "marriage ſettlement of Lord *Montfort*, by which the "houſehold goods in queſtion are ſettled as heir-looms, "with

" with the houſe, in ſtrict ſettlement, and ſpecifically " enumerated in a ſchedule annexed to the ſettlement, " ſo as to avoid any fraud by the addition or purchaſe " of new, are entitled to the poſſeſſion of theſe goods " againſt the defendant Mr. *Kennett*.

" The defendant has taken the goods in execution, " and it is not diſputed that he is a fair creditor; but " the plaintiffs bring this action as truſtees under the " marriage ſettlement. And the queſtion is, whether " they are, againſt the defendant, entitled to the poſ- " ſeſſion of theſe goods, for the purpoſes of the truſt.

" I have thought much of this caſe ſince the trial, " and, in every light in which I have conſidered it, " I have not been able to raiſe a doubt.

" The principles and rules of the common law, as " now univerſally known and underſtood, are ſo ſtrong " againſt fraud in every ſhape, that the common law " would have attained every end propoſed by the ſta- " tutes 13 *Eliz.* c. 5., and 27 *Eliz.* c. 4. The former " of theſe ſtatutes relates to creditors only; the latter " to purchaſers. Theſe ſtatutes cannot receive too " liberal a conſtruction, or be too much extended in " ſuppreſſion of fraud.

" The ſtatute 13 *Eliz.* c. 5., which relates to cre- " ditors, directs, " that no act whatſoever, done to " defraud a creditor or creditors, ſhall be of any effect " againſt ſuch creditor or creditors:" but, then, ſuch " a conſtruction is not to be made in ſupport of cre-

" ditors,

" ditors, as will make third perſons ſufferers. There-
" fore the ſtatute doth not militate againſt any tranſ-
" action *bonâ fide*, and where there is no imagination
" of fraud; and ſo is the common law. But, if the
" tranſaction be not *bonâ fide*, the circumſtance of its
" being done for a valuable conſideration, will not
" alone take it out of the ſtatute. I have known ſe-
" veral caſes, where perſons have given a fair and full
" price for goods; and, when the poſſeſſion was
" actually changed, yet being done for the purpoſe of
" defeating creditors, the tranſaction has been held
" fraudulent, and, therefore, void. One caſe was,
" where there had been a decree in the Court of
" Chancery, and a ſequeſtration: a perſon, with know-
" ledge of the decree, bought the houſe and goods
" of the defendant, and gave a full price for them.
" The court ſaid, that the purchaſe, being with a ma-
" nifeſt view to defeat the creditor, was fraudulent;
" and, therefore, notwithſtanding a valuable conſider-
" ation, void. So, if a man knows of a judgment
" and execution, and, with a view to defeat it, pur-
" chaſes the debtor's goods, it is void; becauſe the
" purpoſe is iniquitous: it is aſſiſting one man to cheat
" another, which the law will never allow. There
" are many things which are conſidered as circum-
" ſtances of fraud. The ſtatute ſays not a word about
" poſſeſſion: but the law ſays, if, after a ſale of goods,
" the vendor continue in poſſeſſion, and appear as the
" viſible owner, it is evidence of fraud, becauſe goods
" paſs by delivery: but it is not ſo in the caſe of a
" leaſe, becauſe that does not paſs by delivery.

" The

Infra f.

" The ſtatute 13 *Eliz.* c. 4. does not go to voluntary
" tary conveyances, merely as being voluntary, but
" to ſuch as are fraudulent. A fair voluntary con-
" veyance may be good againſt creditors, notwith-
" ſtanding its being voluntary. The circumſtance of
" a man's being indebted, at the time of his making
" a voluntary conveyance, is an argument of fraud.
" The queſtion, therefore, in every caſe is, whether
" the act done is a *bonâ fide* tranſaction; or, whether
" it is a trick and contrivance to defeat creditors. If
" there be a conveyance to a truſtee for the benefit
" of the debtor, it is fraudulent: the queſtion then
" is, whether this ſettlement is of that ſort? It is a
" ſettlement, which is very common in great families.
" In wills of great eſtates, nothing is ſo frequent as
" deviſes of part of the perſonal eſtate to go as heir-
" looms: for inſtance, the deviſe of the Duke of
" *Bridgewater*'s library—the old Duke of *Newcaſtle*'s
" plate. So, in marriage-ſettlements, it is very com-
" mon for libraries and plate to be thus ſettled, and
" for chattels and leaſes to go along with the land.
" If the huſband grows extravagant, there never was
" an idea that theſe could be afterwards overturned.
" If this court were to determine that they ſhould,
" the parties would reſort to Chancery. We come
" then to the circumſtances of the preſent caſe, which
" are very ſtrong. There is not a ſuggeſtion of any
" intention to defraud, or the moſt diſtant view of
" diſappointing any creditor. The very object of the
" marriage-ſettlement was, that the lady's fortune
" might be applied to diſcharge all Lord *Montfort*'s
" debts. The amount of this fortune was 10,000 *l.*,

" and

" and was thought fully ſufficient for that purpoſe. " Beſides, this is a ſettlement approved by a Maſter " in Chancery:—moſt clearly the Maſter in Chancery " and the Great Seal could have no fraudulent view. " But it appears further, that the reaſon why the " goods were inſerted was, becauſe the ſettlement of " the real eſtate alone was deemed inadequate without " them. Clearly, therefore, it was no contrivance to " defeat creditors, but meant as a proviſion for the " lady, if ſhe ſurvived, and heir-looms for the ſon.

" An argument, however, is drawn from the poſ- " ſeſſion as a ſtrong circumſtance of fraud; but it " does not hold in this caſe. It is a part of the truſt, " that the goods ſhall continue in the houſe, and for " a very obvious reaſon; becauſe the furniture of one " houſe will not ſuit another: and it was the buſi- " neſs of the truſtees, to ſee the goods were not re- " moved. If Lord *Montfort* had let his houſe with " the furniture, or if the rent could be apportioned, " the creditors would be entitled to the rent, but they " have no right to take the goods themſelves: the " poſſeſſion of them belongs to the truſtees, and the " abſolute property of them is now veſted in the " eldeſt ſon.

" I expected an authority; but though ſuch ſettle- " ments are frequent, no caſe has been cited to ſhew " they are fraudulent. How common are ſettlements " of chattels and money in the ſtocks? Can there " be a doubt but they are good? Yet the creditors " would be entitled to the dividends during the in-

" tereſt of the debtor. Here there was clearly no " intention to defraud, and there is a good conſidera- " tion. Therefore I am of opinion, it could not be " left to the jury to find the ſettlement fraudulent, " merely becauſe there were creditors. The goods " muſt now be kept in the houſe for the benefit of " the ſon."

Stephens v. Olive, 2 Bro. R. 9.

§ 64. In a modern caſe, it was held by Lord *Kenyon*, (when Maſter of the Rolls) that a ſettlement after a marriage, in favour of a wife and children, by a perſon not indebted at the time, was good againſt ſubſequent creditors, and not within the 13 *Eliz.* And in a ſubſequent caſe it was determined by the Maſter of the Rolls, that to impeach a ſettlement after marriage, under the ſtatute 13 *Eliz.* the huſband muſt be proved to have been indebted at the time, and to the extent of inſolvency.

Luſh v. Wilkinſon, 5 Veſ. Jnn. 384.

§ 65. Lord *Kenyon*, in the caſe of *Stephens* v. *Olive*, held, that, where a huſband after marriage conveyed an eſtate to truſtees, for the ſeparate uſe of his wife, the covenants by the truſtees to indemnify the huſband againſt the debts, which the wife might contract, after the ſeparation, was a valuable conſideration; and therefore that the ſettlement, although made after the debt due to the plaintiff was contracted, was good againſt him.

How far the Conſideration of Marriage extends.

§ 66. In the caſe of ſettlements made before marriage, there has been a conſiderable difference of opinion, reſpecting the extent to which the conſidera-

tion

tion of marriage ought to be carried; ſome holding that it ought to extend not only to the eſtates limited to the huſband and wife, and their iſſue, but alſo to thoſe limited to any other branch of the huſband's family.

§ 67. Thus, where a perſon in conſideration of the marriage of his ſon, and of 2000 *l.* marriage portion, ſettled the premiſes to the uſe of himſelf for life, remainder to his ſon and the heirs of his body by that marriage, remainder to the heirs of the body of his ſon by any other wife. It was contended that this laſt limitation, not being within the conſideration of the marriage ſettlement, was voluntary, and therefore void againſt ſubſequent purchaſers. But Lord *Hale* ſaid, that "the conſideration of the marriage and "marriage portion will run through all the eſtates "raiſed by the ſettlement; though the marriage be "not concerned in them, ſo as to make them good "againſt purchaſers, and to avoid a voluntary con-"veyance." Jenkins v. Kemis, Hard. 395.

§ 68. A perſon covenanted in conſideration of the marriage of his eldeſt ſon, and a marriage portion, to ſettle lands on him in tail, remainder to his ſecond ſon. It was held, that the conſideration extended to the remainder to the ſecond ſon, which therefore was not fraudulent againſt creditors. And Lord *Macclesfield* has obſerved, that the reaſon of this doctrine was, becauſe it might be very well intended that the huſband or his parents would not have come into the ſettlement, White v. Stringer, 2 Lev. 105. 2. P. Wms. 175.

ſettlement, unleſs all the parties thereto had agreed to the limitation to the brother.

§ 69. On the other hand there are ſeveral caſes, where the conſideration of marriage has only been allowed to extend to the immediate objects of the ſettlement, and not to any remote ones. Thus it is ſaid 10 Mod. 534. by Lord *Macclesfield*, that where there is a marriage portion and ſettlement, that part of the ſettlement only, which belongs to the wife, and children by that wife, can be eſteemed to be founded upon the conſideration of that marriage: for it is abſurd to imagine, that the friends of the wife ſhould be ſuppoſed as at all concerned about the remote uſes of the ſettlement, upon perſons, to whom they are entire Ante f. 67. ſtrangers. And, as for the caſe of *Jenkins* v. *Keymis*, it ought not to be underſtood in ſo abſurd a ſenſe as that comes to; the meaning of the caſe was no more than this, that a father, when he makes a marriage ſettlement upon one ſon, has ſuch a fair and juſtifiable opportunity offered him of providing for his other children, as that if he thinks fit to lay hold upon and embrace it, by inſerting in the ſettlement proviſions for them, ſuch proviſions ſhall never be eſteemed as fraudulent, and as ſuch ſet aſide in favour of creditors.

9 Mod. 132. § 70. In another caſe his Lordſhip ſaid, that, where a ſettlement is made by the father, or other lineal anceſtor, in conſideration of the marriage of his ſon, in ſuch caſe all the remainders, limited to his children and their poſterity, are within the conſideration of the ſettlement;

ſettlement; but, when it is made by a brother, or other collateral anceſtor, on his marriage, there, after the limitations to his own iſſue, all the remainders limited to his collateral kindred are voluntary, and not within the conſiderations of the marriage ſettlement.

§ 71. Where any other conſideration, beſides that of marriage, appears in a ſettlement, the court will avail themſelves of it to ſupport ſuch ſettlement.

§ 72. *John Hamerton* being ſeiſed in fee of an eſtate, and having a mother who had an annuity of fifty pounds *per annum* iſſuing out of the whole, and alſo two brothers, *Thomas* and *Vavaſor;* and being about to be married; his mother, previous to the marriage, conſented to part with her ſecurity upon the *whole* eſtate for her annuity, and to take inſtead thereof a ſecurity for the ſame upon *part* of the eſtate: and, accordingly, ſhe and *John* (the intended huſband) joined in a fine to deliver the whole eſtate from the annuity, and in conſideration of the marriage, and of a portion of 1300 *l.*, and of the grant and releaſe of the annuity, *John* conveys to truſtees, that they ſhould pay fifty pounds *per annum* to the mother, out of *part* of the eſtate for her life, then as to the whole, to the uſe of *John* for life; remainder to truſtees to preſerve contingent remainders; remainder to the firſt and every other ſon in tail male; remainder to *Thomas Hamerton* and *Vavaſor Hamerton* ſeverally, one after the other in tail male, in ſtrict ſettlement; remainder to the daughter, and daughters of *John Hamerton*, by his intended wife in tail; remainder to *John Hamer-*

Roe v. Mitton, 2 Wilſ. R. 356.

ton in fee. There was no iſſue of the marriage; afterwards *John Hamerton* mortgaged the eſtate to *Monckton*, and acknowledged a fine to him *ſur conceſſit*, then *Monckton* purchaſed of *John Hamerton* in fee, for a valuable conſideration, and took a fine from him *ſur conuſance de droit come ceo*, &c.: *John Hamerton* died without iſſue; but *Thomas Hamerton* left a ſon, who brought an ejectment to recover theeſtate.

Lord Ch. Juſt. *Wilmot* ſaid—The ſingle queſtion is, whether there is a good and valuable conſideration to ſupport the limitation in the ſettlement to *Thomas Hamerton*, the late father of the leſſor of the plaintiff; or, whether that limitation is merely voluntary under the ſtatute of 27 *Eliz.* cap. 6. and bad againſt a purchaſer for a valuable conſideration.

I am very clearly of opinion, that this ſettlement is fair and honourable, and that there is a good and valuable conſideration to ſupport the limitation therein to *Thomas Hamerton*, the father of the leſſor of the plaintiff; and that it is quite out of the ſtatute 27 *Eliz.* c. 6. which was only made againſt covinous and fraudulent conveyances, and which makes the parties avowing ſuch fraudulent conveyances criminal; whether the purchaſer for a valuable conſideration had notice of this ſettlement or not, is not material (I think) in this caſe; but, if he had notice, I am clearly of opinion that the purchaſe is fraudulent.

The whole of this queſtion turns upon the mother's joining in the ſettlement; the friends and relations of *Mary Kelly* (the intended wife of the marriage) muſt

be ſuppoſed to ſay to the mother of *John* the intended huſband, "*Mary* ſhall not marry your ſon, unleſs "you will give up or take off your annuity from the "*whole* of the lands, and let it be charged upon *part* "thereof." The mother anſwers, "If you want my "aſſiſtance, you ſhall pay for it; that is to ſay, you "ſhall limit the eſtate to my younger ſons, in pre- "ference and priority to the daughters of the mar- "riage, in failure of iſſue male:" this is a good conſideration to *John* the ſon (and the *quantum* is not at all material); he purchaſes his wife by his mother's concurrence.

But it was objected, that *John* was ſeiſed in fee, and could have made the ſettlement without the mother; and that in truth no real or good conſideration moved from her at all, for that ſhe ſtill had her annuity charged upon *part* of the lands: in anſwer to this, the applying to the mother ſhews, that *John Hamerton* could not have made a ſettlement agreeable to the lady's friends, without the mother; and I am of opinion that any conſideration, given by the mother, would have made her a purchaſer for her younger ſons; by the limitation to the daughters of the marriage, after *that* to the two brothers of *John Hamerton*, it is plain the mother intended her ſons ſhould be preferred to the daughters of the marriage: and this is as plain to me as if I had heard the mother ſay, "I will not part with my annuity ſecured upon the "whole lands, and take a ſecurity for it upon part of "the lands, unleſs you will prefer my ſons to your "daughters;" the ſettlement can have no other meaning; and any conſideration moving from a parent

to a child is good. The whole court were of the ſame opinion; and judgment was given for the plaintiff.

Settlement by a Widow on her Children.

§ 73. There have been ſome caſes, in which a conveyance, founded on a moral conſideration only, has been held good againſt a ſubſequent purchaſer.

Newſtead v. Searles, 1 Atk. 265. King v Cotton, 2 P. Wms. 674.

§ 74. A widow who had two children, by articles previous to her ſecond marriage, with the conſent of her intended huſband, ſettled her eſtate upon her two children. The huſband and wife afterwards mortgaged the eſtate to a perſon who had notice of the ſettlement. Lord *Hardwicke* ſaid, the queſtion was, whether the articles were for a valuable conſideration and binding, or ought to be conſidered as voluntary and fraudulent, with reſpect to ſubſequent creditors or purchaſers. And if he was to lay it down as a rule that ſuch articles were not binding, it would become impoſſible for a widow on her ſecond marriage, to make any certain proviſion for the iſſue of a former; and the ſecond huſband might then contrive to defeat the proviſion made for thoſe children. His Lordſhip therefore decreed, that the articles ought not to be conſidered as voluntary, for there were reciprocal conſiderations both on the part of the huſband, and the wife, and the mortgagee had notice of the articles.

Whether Copyholds are within theſe Statutes,

§ 75. It appears to be ſomewhat doubtful whether copyhold eſtates are within theſe ſtatutes. In a modern caſe it was contended, that copyholds not being

being within the miſchief intended to be remedied by theſe acts, were not comprehended under the general words, lands, tenements, and hereditaments. Lord *Mansfield* obſerved, there was great reaſon to ſay, that the ſtatute 17 *Eliz.* does extend to copyhold eſtates; but it was ſtrange that ſuch a point ſhould be firſt agitated at that time. He ſhould rather think it had been taken for granted, that the ſtatute does extend to copyhold eſtates, becauſe in being ſo conſtrued, it can work no prejudice to the lord: and the object of the ſtatute was, to ſuppreſs fraud, but it was not neceſſary abſolutely to determine that queſtion.

Doe v. Routledge, Cowp. 705.

§ 76. The ſtatutes 13 and 27 *Eliz.* only avoid voluntary conveyances, as againſt creditors and ſubſequent purchaſers; and therefore the perſon making a voluntary conveyance, and all thoſe claiming under him, are as much bound by it, as if it was made for a valuable conſideration.

Voluntary Conveyances are binding on the Party.

Treat. of Eq. B. 1. c. 4. ſ. 12.

§ 77. *A.* made a voluntary conveyance to *B.*, and afterwards made a mortgage of the ſame lands. The firſt deed, on a trial at law, was found to be fraudulent. *B.* exhibited his bill to redeem the mortgage. It was decreed, that though the deed to *B.* was fraudulent, becauſe *quoad* the mortgage money and *pro tanto*, it was voluntary, yet it was good as to the equity of redemption, and would paſs it; for a voluntary deed is good againſt the party who makes it, and his heirs, though not againſt a mortgagee.

Rand v. Cartwright, Nelſ. Cha. R. 101.

Goodwin v. Goodwin, 1 Cha. Rep. 173.

§ 78. Where there are two voluntary conveyances executed, the Court of Chancery will not relieve the latter againſt the former; and in ſuch a caſe, he who has the eſtate by law ſhall hold it.

Dureſs.

§ 79. All deeds made by perſons under dureſs of impriſonment, or dureſs *per minas*, is void. Thus, if a perſon is put under any illegal reſtraint or confinement, until he executes a deed, he may alledge this dureſs, and thereby avoid the deed. But if a man be lawfully impriſoned, and either to procure his diſcharge, or on any other fair account, executes a deed, he will not be allowed to avoid it.

2 Inſt. 482.

§ 80. If a man, through a reaſonable and well founded fear of death, or mayhem, or loſs of limb, is prevailed upon to execute a deed, he may afterwards avoid it. But Lord *Coke* ſays, it is otherwiſe where a deed is executed for fear of battery, which may be very light, or burning his houſes, or taking away, or deſtroying his goods, or the like, for there he may have ſatisfaction by recovery of damages.

Id. 483.

Equity avoids Deeds obtained by Fraud.

§ 81. Although the courts of common law have a juriſdiction in all matters of fraud, and may ſet aſide deeds upon that ground; yet the uſual practice has long been to ſeek redreſs in equity, againſt deeds that have been fraudulently obtained, becauſe a court of equity will allow of a great number of averments, and will admit of ſeveral kinds of evidence, which are not permitted in courts of law.

§ 82. The

§ 82. The caſes which have been decided on this head are ſo various, and each of them depends ſo much on its own particular circumſtances, that it would be impoſſible to deduce many general principles from them.

It may, however, be laid down, that ignorance and miſapprehenſion of the party, is a ground on which courts of equity have ſometimes avoided a deed. But equity will not interpoſe if the fact was from its nature doubtful, or equally unknown to both parties at the time of the agreement. Treat. of Eq. B. 1. c. 2. ſ. 7.

§ 83. It is not every ſurpriſe that will avoid a deed duly made, nor is it fitting, for it would occaſion great uncertainty, and it would be impoſſible to fix what was meant by ſurpriſe, for a man may be ſaid to be ſurpriſed in every action which is not done with ſo much diſcretion as it ought to be: but the ſurpriſe here intended muſt be accompanied with fraud and circumvention, and then it muſt be proved; for fraud is a thing odious in law, and never to be preſumed. Idem ſ. 8.

§ 84. Inadequacy of conſideration is a gronnd upon which equity has ſometimes avoided a deed; provided it be ſuch as to ſhew that the perſon did not underſtand the bargain he made, or was ſo oppreſſed that he was glad to make it, knowing its inadequacy. For theſe circumſtances will ſhew a command over him, which may amount to a fraud. But there is no caſe in which it has been held, that mere inadequacy of Idem ſ. 9. & 10. Gwynne v. Heaton, 1 Bro. Rep. 1.

price is a ground for a court of equity to annul an agreement, though executory, if the ſame appear to have been fairly entered into, and underſtood by the parties, and capable of being ſpecifically performed. Still leſs does it ſeem to have been conſidered as a ground for reſcinding an agreement actually executed.

Vide Bro. Parl. Ca. Tit. Fraud.

§ 85. Bonds or beneficial leaſes, taken as rewards for procuring marriages, will be ſet aſide in equity; becauſe ſuch tranſactions tend to corrupt executors, truſtees, guardians, and others connected with perſons of fortune, to betray them into improper marriages.

Treat. of Eq. B. 1. c. 4. ſ. 10. Scribblehill v. Brett, 4 Bro. Parl. Ca. 144.

§ 86. Weakneſs of underſtanding is alſo a ground upon which a court of equity will invalidate a deed; but Lord *Thurlow* has obſerved that there is an infinite, nay, almoſt inſurmountable difficulty in laying down abſtract propoſitions upon a ſubject which depends upon ſuch a variety of circumſtances, as the legal competency of the mind to the act in which it is engaged, if its competency be impeached by poſitive evidence of an anterior derangement, or affected by circumſtances of bodily debility, ſufficiently ſtrong to lead to a ſuſpicion of intellectual incapacity.

3 Bro. Rep. 443.

§ 87. If a woman, on the point of marriage, charges or conveys away her eſtate to a ſtranger, ſuch charge or conveyance will be decreed to be void, being in fraud of the right which the huſband acquired to his wife's property by the marriage.

Or made in Derogation of the Rights of Marriage.

§ 88. Thus,

§ 88. Thus, a recognizance entered into by the wife the day before her marriage, was ſet aſide, and a perpetual injunction granted, though one witneſs depoſed the huſband's conſent to the drawing it, but that witneſs had an aſſignment of it to himſelf. Lance v. Norman, 2 Rep. in Ch. 41.

§ 89. So, where a widow made a conveyance of her former huſband's eſtate, prior to her marriage, and without the privity of her ſecond huſband; it was decreed, that the ſecond huſband ſhould enjoy the eſtate notwithſtanding. Howard v. Hooker, 2 Rep. in Ch. 42.

§ 90. It has been determined on the ſame principle, that a conveyance made by a woman before her marriage to truſtees, for her ſeparate uſe, without the privity of her intended huſband, will be void, as againſt the huſband.

§ 91. Lady *Dayrell*, before her marriage, conveyed away her eſtate without the privity of her intended huſband, to truſtees for her ſeparate uſe. It was decreed, that the huſband ſhould have the poſſeſſion of the eſtate. Carleton v. Dorſet, 2 Vern. 17.

§ 92. Lord *Hardwicke* has ſaid, that if a woman about to marry, gives away a part of her property, or gives a ſecurity or aſſignment, they are relievable againſt in Chancery. But where a debt is contracted for valuable conſideration, though concealed from the huſband, it is no fraud on the marriage. Blanchet v. Foſter, 2 Veſ. 264.

§ 93. Where a widow aſſigned over the greater part of her property to truſtees, in truſt for herſelf during her King v. Cotton, 2 P. W. 358. 674.

her widowhood, and, in the event of her marrying again, in truſt for her ſecond ſon, but the conveyance was made publicly, and prior to the marriage treaty with her ſecond huſband. On a bill filed by the huſband to ſet aſide this conveyance, Lord *King* diſmiſſed it, ſaying, it was a very reaſonable thing for a widow, while it was in her power, to make a proviſion for her children by her former huſband; and this being before her treaty of marriage with the plaintiff, it had been impoſſible to have aſked him to be a party thereto, he not being then thought of.

§ 94. In a modern caſe, it appears to have been held, that a ſettlement made by a woman while unmarried, is not in all caſes void againſt any huſband ſhe may afterwards take: to avoid ſuch a ſettlement, the huſband muſt ſhew to the court that he has been deceived; mere concealment alone is not enough. And if he demands to have the deed ſet aſide, without offering to make any proviſion for the wife, this is a ground for refuſing relief. That in all caſes, where a man comes into Chancery for his wife's fortune, he muſt make a ſettlement; and a man who marries without a treaty, muſt be content to take a wife as he finds her.

Strathmore v. Bowes, 2 Bro. R. 345. 1 Veſ. Jun. 22. 6 Bro. Parl. Ca. 427.

§ 95. The Counteſs of *Strathmore*, a widow, having five children, and being tenant for life of a very conſiderable real eſtate, on the 10th of *January* 1777, executed indentures of leaſe and releaſe, dated the 9th and 10th of the ſame month, whereby ſhe conveyed to two truſtees, all the eſtates whereof ſhe was ſeiſed for her life,

life, upon truſt for her ſole and ſeparate uſe, excluſive of any huſband ſhe ſhould thereafter marry, with a power of revocation.

This ſettlement was, in fact, made in contemplation of Lady *S.*'s marriage with Mr. *Grey*, and was with his knowledge and conſent; but, on the 17th of the ſame *January*, ſhe married Mr. *Stoney*, who afterwards took the name of *Bowes*. In the following month of *May*, Lady *S.*, by the terror of perſonal violence, was compelled to ſign a deed of revocation of the indentures of the 9th and 10th *January*. In the year 1785, Lady *S.* quitted her ſaid huſband, and ever after lived ſeparate and apart from him, and exhibited her bill againſt him, in order to have the indentures of the 9th and 10th *January* eſtabliſhed, and to ſet aſide any deed of revocation ſhe might have executed. An iſſue was directed to try whether the deed of the 1ſt *May* 1777 was obtained by dureſs, and the jury found that it was. The cauſe came on before Mr. Juſtice *Buller*, ſitting for the Chancellor, who decreed, that the deeds of the 9th and 10th *January* ſhould be eſtabliſhed.

Upon a rehearing before Lord *Thurlow*, this decree was affirmed.

Mr. *Bowes* appealed to the Houſe of Lords; and it was contended on his part, 1ſt, That the deeds of the 9th and 10th of *January* 1777, were a fraud upon the contract of marriage between the appellant and the reſpondent Lady *Strathmore*, being made without the knowledge

knowledge of the appellant, and concealed from him at the time of ſuch marriage.

2d, That, although ſuch deeds were ſuggeſted to have been made in contemplation of a marriage intended between the ſaid Counteſs of *Strathmore* and another perſon, yet ſuch marriage did not take effect; and, although the diſpoſition made by thoſe deeds might not be fraudulent, as againſt a perſon knowing of, and conſenting to ſuch diſpoſition, yet, as it would be clearly fraudulent againſt creditors, or purchaſers for a valuable conſideration, there was no found reaſon why the ſame ſhould not be deemed fraudulent as againſt the appellant, who, by the marriage, gave to Lady *Strathmore* a legal title to dower in his own eſtate, (worth, at that time, as he aſſerted, about 1,000 *l. per annum*), and became reſponſible for all the obligations of a huſband, and particularly for debts, contracted or to be contracted by her.

3d, That all the caſes which have been determined by courts of equity upon the ſubject, agree in regarding ſuch a diſpoſition as fraudulent and void, eſpecially, where made merely and only for the immediate and ſeparate benefit of the perſon making it.

4th, That, if the decrees complained of ſhould be eſtabliſhed, a precedent would exiſt, deſtructive of confidence in every matrimonial engagement, and leading to conſequences ſubverſive of all the grounds on which the law of this country, with reſpect to the obligations

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on huſbands, by force of the contract of marriage, is founded.

The reſpondent ſubmitted the following reaſons for the affirmance of the decrees:

1ſt, That by the law of this country, a woman, while unmarried, may diſpoſe of and convey her property in any manner ſhe pleaſes; and a huſband whom ſhe afterwards marries, without any ſettlement made by him, or any inquiry concerning her fortune, has no right to impeach any conveyance which ſhe has made of her property, for her own ſeparate uſe.

2d, That there is no inſtance, in which conveyances, made by a woman of her property before marriage, have been deemed void, becauſe they have not been diſcloſed to the huſband, unleſs attended with ſuch circumſtances as proved ſuch conveyances to be fraudulent; and that ſuch conveyances are, in the caſe of a ſecond marriage, where there are children by a former one, reaſonable and laudable, and often favoured in a court of equity.

3d, That it was impoſſible to look at the circumſtances of this caſe, without perceiving that ſuch a conveyance, as the appellant attempted to impeach, might be extremely reaſonable. That, if it be poſſible to conceive the huſband, of all others, who ought the leaſt to be permitted to queſtion any ſuch diſpoſitions made by a wife, the appellant was that huſband. That every ſtep, by which he acquired his ſuppoſed marital rights,

rights, was groſsly fraudulent; and, therefore, it would be an extraordinary adminiſtration of equity, to give him the property of his wife, which the law has ſecured to her, as the reward of his fraud. That his attempt to invalidate the deed in queſtion, muſt appear ſtill more extraordinary, it having been determined that he, by terrors of perſonal violence, had extorted from the reſpondent another deed, for the purpoſe of defeating this, which, by the appeal, he contended, was in itſelf void.

Vide Treat. of Eq. B. 1. c. 2. ſ. 6.

The decree was affirmed, with 150 *l.* coſts.

Martins v. Bennett, Bunb. 336.

§ 96. Where a father got his ſon to execute a deed ſecretly on the morning of his marriage, charging the eſtate which was ſettled, it was ſet aſide by the Court of Chancery, as being in fraud of the marriage agreement.

Gilb. Cha. 267.

§ 97. Lord Chief Baron *Gilbert* ſays, if a huſband ſeiſed in fee, ſhould immediately before his marriage, veſt the legal eſtate in truſtees, to diſappoint his intended wife of her dower, ſuch a conveyance would be reckoned fraudulent; becauſe it was made with an ill conſcience, in order to deprive his wife of the proviſion made for her by the common law.

TITLE

TITLE XXXII.

DEED.

CHAP. XXIII.

Of the Conſtruction of Deeds.

§ 1. *General Rules.*
13. *Words ſometimes rejected.*
15. *Omiſſions ſupplied.*
17. *Where a Deed cannot operate in the Way intended, it will be allowed to operate ſome other way.*
23. *Where the Grantee has an Election, how to take.*
26. *In what Caſes Averments are admitted.*
27. *Where a Deed is uncertain, it has no Effect.*
29. *Conſtruction of Conveyances to Uſes.*
§ 32. *Conſtruction of Declarations of Truſt.*
34. *Conſtruction of Articles.*
35. *Particular Rules.*
36. *Parties.*
38. *Recital.*
40. *Grant.*
43. *Habendum.*
50. *Where repugnant to the Premiſes.*
55. *Where it enlarges, abridges, or explains the Premiſes.*
64. *Where it is not controlled by the Premiſes.*
67. *Words of Limitation and Purchaſe.*

Section 1.

General Rules. Shep. Tou. 253.

IN the conſtruction of deeds, there are two ſorts of rules; one general, and applicable to every kind of deed: the other particular, and applicable only to ſome one kind of deed, or to ſome particular part of a deed.

1 Inſt. 36 *a.* Plowd. 154. 160.

§ 2. With reſpect to the firſt ſort, it is a maxim of the higheſt antiquity in the law, that all deeds ſhould be conſtrued favourably, and as near the apparent intention of the parties as poſſible, conſiſtent with the rules of law. *Benignæ ſunt faciendæ interpretationes chartarum propter ſimplicitatem laicorum, ut res magis valeat quam pereat.*

§ 3. If,

§ 3. If, however, the intention of the parties be contrary to the rules of law, it will then be otherwiſe; for it would be highly improper and inconvenient to permit private perſons to contradict the general rules of law.

Thus, if a perſon conveys lands to another and his heirs for 21 years, the executor of the grantee, and not his heir, will be entitled to the land; becauſe it is a rule of law, that a term for years is but a chattel.

2 Saund. 167. § 4. *Quoties in verbis nulla eſt ambiguitas, ibi nulla expoſitio contra verba fienda eſt.* So that, where the intention is clear, too minute a ſtreſs ought not to be laid on the ſtrict and preciſe ſignification of words; 1 Inſt. 381 *b.* according to another antient maxim, *qui hæret in litera, hæret in cortice.*

§ 5. *Mala grammatica non vitiat chartam;* ſo that, neither bad *Latin*, nor bad *Engliſh*, will make a deed void.

§ 6. The conſtruction ought to be made on the entire deed, and not merely upon any particular part of it. *Ex antecedentibus et conſequentibus fit optima interpretatio:* and, therefore, every part of a deed ought, if poſſible, to take effect, and every word to operate.

1 Inſt. 183 *a.* § 7. A deed is always conſtrued moſt ſtrongly againſt the grantor. *Verba chartarum fortius accipiuntur contra proferentem; et qælibet conceſſio fortiſſime contra donatorem interpretanda eſt.* For the principle of ſelf-

intereſt will make men ſufficiently careful not to prejudice their own intereſt, by uſing words of too extenſive a meaning; and all manner of deceit is hereby avoided in deeds; for men would always affect ambiguous expreſſions, if they were afterwards at liberty to put their own conſtruction on them.

§ 8. Where general words ſtand alone in a releaſe, unqualified by any recitals, they ſhall be conſtrued moſt ſtrongly againſt the releaſor; but where there is a particular recital in a deed, and thoſe general words of releaſe are inſerted, the generality of the words ſhall be qualified by the recital.

§ 9. A releaſe was executed in purſuance of an award, in which a releaſe of all demands was inſerted. It was contended, that the words were ſufficient to releaſe a growing rent; but it was determined, that they ſhould not have ſo extenſive an effect, becauſe they were qualified by a particular recital. Henn v. Handſon, 1 Sid. 141.

§ 10. A diſtinction muſt, however, be made, in caſes of this kind, between an indenture and a deed-poll. For the words of an indenture executed by both parties, are to be conſidered as the words of both. But, in a deed-poll, they are the words of the grantor, and ſhall be taken moſt ſtrongly againſt him.

§ 11. If the words of a deed will bear two different ſenſes, the one conformable to law and juſtice, and the other againſt it, that ſenſe ſhall be preferred, which is conformable to law and juſtice: for it is alſo a maxim 1 Inſt. 42 a.

Idem 183 *a.* of law, *quod legis conſtructio non facit injuriam.* Thus, if a tenant in tail makes a leaſe for life generally, it ſhall be for the life of the tenant in tail; for, otherwiſe, it would operate as a wrong.

§ 12. It is a rule of law, that no man ſhall raiſe a fee-ſimple to his own right heirs as purchaſers. For, where an anceſtor, by any ſort of conveyance, appoints that, at his death, his heirs ſhall by gift from him come to that very inheritance which the law of deſcent caſts upon them, it is conſtrued as a vain and fruitleſs attempt to give that to the heirs, which the law itſelf veſts in them. Thus, Lord *Coke* ſays, if a man make a gift in tail, or leaſe for life, the remainder to his own right heirs, this remainder is void, and he hath the reverſion in him.

1 Inſt. 22 *b.* Fearne Cont. Rem. 66. Tit. 11. ch. 4. ſ. 26.

Words ſometimes rejected.

§ 13. Where there are any words in a deed that appear to be evidently repugnant to the other parts of it, and to the general intention of the parties, they will be rejected as inſenſible: for the words are not the principal things in a deed, but the intent and deſign of the parties.

Smith v. Parkhurſt, 3 Atk. 135.

§ 14. Thus, where lands were limited to the uſe of *A.* for 99 years, if he ſhould ſo long live, and from and after the death of *A.*, or other ſooner determination of the eſtate limited to him for 99 years, to the uſe of truſtees and their heirs during the life of *A.*, to preſerve contingent remainders. It was determined by all the Judges of the Court of King's Bench, that the words, "and from and after the death of *A.*" ſhould

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be rejected as inſenſible, and repugnant to the ſubſequent words. And this determination was affirmed in the Houſe of Lords, by the advice of all the Judges. 6 Bro. Parl. Ca. 351.

§ 15. An evident omiſſion or miſtake will be ſupplied in a deed: and, therefore, in a caſe, where the name of the bargainor was omitted in the operative part of a bargain and ſale, yet it was ſupplied. Omiſſions ſupplied.

§ 16. *Nathaniel* Lord *Say* and *Sele* conveyed his eſtate to *B*: *K*. for the purpoſe of making him a tenant to the *præcipe*, by a deed of bargain and ſale, which was worded in the following manner: "Witneſſeth, "that, for and in conſideration of 5 *s*. by the ſaid *B*. *K*. "to the ſaid Lord *S*. and *S*. in hand paid, as alſo for "the cutting off all intails, &c. and for ſettling and "aſſuring the ſame to the ſaid Lord and his heirs, "doth bargain, ſell, and confirm, unto the ſaid "*B*. *K*." &c. Lloyd v. Lord Say and Sele, 1 Salk. 341. 10 Mod. 40.

The Court of King's Bench was of opinion, that this deed paſſed the freehold, becauſe ſuch was the plain intention of it.

Upon a writ of error in the Houſe of Lords, it was contended, that this bargain and ſale could not convey any eſtate, becauſe it was not mentioned therein, that any perſon did bargain and ſell the lands in queſtion. There appeared, indeed, the words bargain and ſell, but it was not ſaid who bargained and ſold, and, conſequently, Lord *S*. did not bargain and ſell. On the other ſide, it was argued, that it appeared *prima facie* 4 Bro. Parl. Ca. 73.

that the conſideration money was paid by *B. K.* to Lord *S.*, and that it was for barring all intails and remainders in the premiſes, and aſſuring the ſame to Lord *S.* and his heirs. That it appeared as well by this deed itſelf, as by the evidence on the trial, that the manors and lands therein mentioned, were the eſtate of Lord *S.*, and that the intent of the deed was to make *B. K.* tenant to the freehold, in order that a common recovery might be ſuffered. And, therefore, the Court of King's Bench were unanimouſly of opinion, that the freehold was well conveyed, by the deed. The judgment was affirmed.

Where a Deed cannot operate in the Way intended, it will be allowed to operate ſome other Way. Shep. Tou. 82.

§ 17. If a deed cannot operate in the manner intended by the parties, the judges will endeavour to conſtrue it in ſuch a way as that it ſhall operate in ſome other manner, it being a maxim of law, *quando quod ago non valet ut ago, valeat quantum valere poteſt.* In conſequence of this principle, it has been determined, that a deed which was intended to operate as a leaſe and releaſe, or bargain and ſale, but could not take effect in that manner, was held to be good as a covenant to ſtand ſeiſed.

Vide ante Ch 12. ſ. 2, 3, 4.

§ 18. So, where a conveyance was void as a leaſe and releaſe, becauſe the releaſor had only a term for years in the lands, it was reſolved, that it ſhould operate as a grant and aſſignment.

Marſhall v. Franks, Gilb. Eq. R. 143

§ 19. A perſon, poſſeſſed of lands for a term of 999 years, did, for a valuable conſideration, by leaſe and releaſe, grant, bargain, ſell, and demiſe them to truſtees

truſtees and their heirs, to the uſe of himſelf and his wife for their lives, remainder to the heirs of the wife; and covenanted that he was ſeiſed in fee.

The wife died without iſſue, having made a writing in the nature of a will, and thereby deviſed the lands to *B.* and his heirs.

It was argued, that nothing paſſed by this conveyance: for, it being only a term in groſs, no uſe paſſed to the truſtees by the ſtatute 27 *Hen.* 8., which only raiſes a uſe out of a freehold; that no uſe paſſed by the leaſe for a year or bargain and ſale; and, therefore, the releaſe could not operate by way of enlargement. But the Lord Chancellor was of opinion, that, although this conveyance was void as a leaſe and releaſe, yet the huſband being in poſſeſſion, and the word "grant" being inſerted in the releaſe, it ſhould take effect as a grant or aſſignment of his whole intereſt at common law.

§ 20. A releaſe will be conſtrued to operate as a grant of a reverſion, in order to effectuate the intention of the parties.

§ 21. *Robert Edwards*, being ſeiſed of a reverſion in fee expectant on an eſtate for life, by deed of releaſe did renounce, remiſe, releaſe, and for ever quit claim all the ſaid premiſes to *A.*, and the heirs male of his body, and all his right, title, and intereſt therein. It was contended, that nothing paſſed by the releaſe in this caſe, for want of proper operative words: there Goodtitle v. Bailey, Cowp. 597.

were appropriated terms to every conveyance, and, where the word "grant" is uſed, being *genus generaliſſimum*, if the inſtrument cannot take effect according to its proper form, it ſhall operate in ſome other, if by law it can. But, here, the words are, "renounce, "releaſe, and quit claim," which are the ſpecial form of words adapted to a releaſe only; therefore, it cannot operate as a grant; 1 *Inſt.* 301. "A releaſe can- "not operate as a grant; becauſe it is a peculiar man- "ner of conveyance, adapted to a ſpecial end." In the caſe of *Roe* v. *Franmer*, the word "grant" was uſed, and ſo it was in the caſes there cited; but, here, there was no ſuch word, nor any thing equivalent to it; conſequently, nothing paſſed by the deed.

Ante Ch. 12. ſ. 6.

Lord *Mansfield*.—"The rules laid down in reſpect "of the conſtruction of deeds, are founded in law, "reaſon, and common ſenſe: that they ſhall operate "according to the intention of the parties, if by law "they may; and, if they cannot operate in one form, "they ſhall operate in that, which by law will effectu- "ate the intention. But an objection is made in this "caſe, which, it is ſaid, takes it out of the general "rule, and the doctrine of the authorities cited; "and that is, that in the releaſe in queſtion, the word "*grant* is not made uſe of: but that the intention of "the parties was, to paſs all the right and title of the "plaintiff in theſe premiſes, is manifeſt beyond a "doubt."

Mr. Juſtice *Aſton* obſerved, that this was the common wording of a releaſe, but though in the ſhape of a re-

a releaſe, if there were ſufficient words, it might operate as a grant.

Judgment was given upon another point.

§ 22. All modern deeds contain, in the granting part, a great number of the moſt operative technical words. Thus, in a releaſe, the words "grant, bargain, ſell, alien, releaſe, and confirm," are conſtantly uſed; becauſe, if the conveyance ſhould not happen to be good as a releaſe, it may, notwithſtanding, operate as a grant, a bargain and ſale, or a confirmation.

§ 23. Where a deed may enure in different ways, the perſon to whom it is made, ſhall have his election which way to take it. As, if a deed of grant be made by the words "*dedi et conceſſi*," this, in law, may amount to a grant, feoffment, gift, leaſe, releaſe, confirmation, or ſurrender; and it is in the choice of the grantee to plead or uſe it, the one way or the other.

Where the Grantee has an Election, how to take. Shep. Tou. 83.

§ 24. Sir *R. Heyward*, being ſeiſed in fee of the manor of *D.*, *&c.* and of divers lands and tenements, whereof part was in demeſne, part in leaſe for years with rents reſerved, and part in copyhold, by indenture, in conſideration of a ſum of money paid to him by *R. W.* and *E. P.*, demiſed, granted, bargained, and ſold to the ſaid *R. W.*, *&c.* the ſaid manors, lands, tenements, and the reverſions and remainders of them, with all rents reſerved on any demiſe, to hold to them and their aſſigns preſently after the deceaſe of the ſaid

Heyward's Caſe, 2 Rep. 35 *a*.

R. Heyward, for the term of 17 years; which indenture was acknowledged to be inrolled. And, afterwards, the ſaid Sir *R.*, by another indenture, covenanted with *T. F.* and others, to ſtand ſeiſed of the premiſes to the uſe of himſelf and the heirs of his body, and no attornment was made under the firſt conveyance. The queſtion was, whether the bargainees ſhould have election to take by the bargain and ſale *in toto*, or by the demiſe *in toto*, notwithſtanding their general entry; or whether the intereſt, which paſſed as an intereſt at common law, ſhould be preferred before the raiſing an uſe. It was reſolved by *Popham* and *Anderſon*, Chief Juſtices, and the whole court of wards, that *R. W.* and *E. P.*, had election to take it, either by demiſe at the common law, or by bargain and ſale: for, where a perſon, ſeiſed in fee, for money, demiſes, grants, bargains, and ſells his land for years, he, who is owner of the land, by his expreſs grant, gives election to the leſſee to take it by the one way or the other, for he hath ſole power to paſs it by demiſe or bargain; and, therefore, the law will not make conſtruction againſt ſuch expreſs grant, and, namely, in this caſe, where it would tend to the prejudice of the leſſees: for, if the law ſhould force them to take it by demiſe, then they would loſe the rents reſerved upon the leaſes for years.

It was alſo reſolved, that this right of election continued, notwithſtanding the alteration of the eſtate by the ſecond indenture, the death of the leſſor, and the queen's right to the wardſhip of the heir: and that, where an eſtate paſſes, and the donee or grantee has a right

1 Inſt. 145 *a*.

right of election, such right descends to his heirs or executors.

§ 25. Lord *Hobart* says, if an act will work two ways, the one by an interest, the other by an authority or power, and the act be indifferent, the law will attribute it to the interest, and not to the authority; and so it must be taken, for *fictio cedit veritati*. But where interest and authority meet, if the party declare clearly that the act shall take effect from his authority, or power, there it shall prevail against his interest, for *modus et conventio vincunt legem*.

Hob. R. 159.

Vide ante Ch. 16. s. 59.

§ 26. Since the statute of frauds, no averment can be made in contradiction to a written agreement: and, even in the case of an *ambiguitas patens*, that is, an ambiguity which appears upon the face of the instrument, no averment is allowed. But, in the case of an *ambiguitas latens*, an averment supported by parol evidence is admissible. Hence Lord *Bacon*'s maxim, 23. *Ambiguitas verborum latens verificatione suppletur; nam quod ex facto oritur ambiguum, verificatione facti tollitur.* Thus, if a feoffment be made of the manor of *S.*, and the feoffor has a manor called *North S.*, and another called *South S.*, parol evidence will be admitted to shew, which manor was meant.

In what Cases Averments are admitted.

Treat. of Eq. B. 1. c. 3. s. 12.

Bacon's Tra. 101.

Vide 1 Bro. R. 338. 5 Bro. Parl. Ca. 166.

§ 27. Where the words of a deed are so uncertain, that the intention of the parties cannot be discovered, the deed will have no effect. Thus, a gift to *A.* or *B.*, or to one of the children of *J. S.*, he having four, is void for the uncertainty.

Where a Deed is uncertain, it has no Effect.

2 And. R. 103.

§ 28. Lands

Windſmore, v. Hobart, Hob. R. 313.

§ 28. Lands were demiſed to *Thomas Hobart*, *habendum* to the ſaid *Thomas* and to three others perſons *ſucceſſive*. It was reſolved, that no one could take immediately, but *Thomas Hobart*, becauſe he was the only party to the deed, and the reſt were only named in the *habendum*; and that the others could not take by way of joint remainder on account of the word *ſucceſſive*, and that they could not take in ſucceſſion for the uncertainty who ſhould take firſt, and who ſhould follow.

Conſtruction of Conveyances to Uſes, Cro. Eliz. 208. Leigh v. Brace, Carth. 343. Makepeace v. Fletcher, Com. Rep. 457. Goodtitle v. Stokes, 1 Wilſ. 301. 2 Veſ. 252. 3 Atk. 734.

§ 29. It was formerly held, that conveyances to uſes ſhould be conſtrued like wills, that is, according to the intention of the parties, though not expreſſed in the proper, legal, and technical words. In the caſe of *Rigden* v. *Vallier*, where the queſtion was, whether in a covenant to ſtand ſeiſed the words were to be conſtrued ſtrictly, Lord *Hardwicke* ſaid—"It is objected "that there is no warrant to conſtrue a deed to uſes "as to the limitations and words of it in a greater "latitude than a conveyance at common law; and if "conſtrued in a different manner would cauſe great "confuſion, which I hold to be true in general, for "the ſtatute joining the eſtate and the uſe together, "it becomes one entire conveyance, by force of the "ſtatute, and the words are to be conſtrued the ſame "way; but this is to be taken with ſome reſtriction, "As to the words of limitation in a deed, they are, "to be ſure, to be conſtrued in that manner, *viz.* in "the ſame ſenſe; but where they are words of regu-"lation, or modification of the eſtate, and not words "of limitation, I think there is no harm in giving

"them

" them greater latitude in deeds on the ſtatute of uſes, " which are truſts at common law, than in feoffments, " which are ſtrict conveyances at common law."

§ 30. If it ſhould be eſtabliſhed that conveyances to uſes, which are now become the common aſſurances of the realm, were to be conſtrued in the ſame manner as wills, even with reſpect only to the words of regulation, or modification of the eſtate, ſuch a doctrine would in ſome degree tend to introduce all that latitude and uncertainty, which now prevail in the conſtruction of teſtamentary diſpoſitions. Of this opinion was the late Mr. *Booth*, the moſt able conveyancer of the laſt century, who ſays in one of his opinions:—" If deeds of uſes muſt be governed by " the ſame rules, as prevail with reſpect to wills, then " a limitation to a man's male deſcendant, or male " children, may create an eſtate tail; and an abſolute " inheritance may paſs by a limitation to the uſe of " the grantee for ever; which will produce infinite " confuſion." Caſes and Opinions, v. 2. 279.

§ 31. Mr. *Booth*'s opinion is fully confirmed by the late Lord Chief Juſtice *Willes* and his brethren, in the caſe of *Tapner* v. *Marlott*, where his Lordſhip ſays;— " As to what was inſiſted upon, that a conveyance to " uſes is to be conſtrued as a will, and in a different " manner from other conveyances, we are all clearly " of a contrary opinion: for, ſince the ſtatute of " uſes, an uſe is turned into a legal eſtate to all intents " and purpoſes. It muſt be conveyed exactly in the " ſame manner, and by the ſame words; and, if it " were Willes Rep. 180.

" were otherwiſe, as moſt conveyances are now made " by way of uſe, endleſs confuſion would enſue."

2 Bro. R. 233. 3 Term R. 765. Lord *Thurlow* and Lord *Kenyon* have fully aſſented to this doctrine.

Conſtruction of Declarations of Truſt. Perne Cont. Rem. 218.

§ 32. Declarations of truſts are conſtrued in the ſame manner as other conveyances, where an eſtate is finally limited by a deed, without any kind of reference to a further execution of the truſt, by a conveyance directed to be made: for, in ſuch caſes, any occaſional conveyance, that may at any time be required of the legal eſtate from the truſtees, may well be deemed a matter of form only; and not otherwiſe requiſite than for the mere purpoſe of inveſting the ſubſiſting truſts, whatever they may be, with their commenſurate legal eſtates.

Idem.

§ 33. But a declaration of truſt, whoſe effect is referred to another conveyance, directed to be made for its eſtabliſhment, may reaſonably be conſidered as left to ſome degree of modification, by that ſupplemental part of the deed, *viz.* the conveyance to which the completion of the truſts is referred: and ſuch conveyance may be directed to be made, ſo as to effectuate the intentions of the perſon creating the truſt, with leſs regard to the ſtrict rules of conſtruction, than in a caſe of a truſt executed.

Conſtruction of Articles.

§ 34. With reſpect to the conſtruction of articles or agreements, it is different from that of regular conveyances: for articles are only conſidered by courts of equity as preparing ſomething to be after-

wards completed. And it is the conſtant rule to look upon them as merely the heads of the points agreed upon between the parties, and as minutes drawn by them to lay before counſel, in order to direct and guide them to carry the intent and ſcheme of the parties into execution: and, when application is made to the Court of Chancery for that purpoſe, it will mould them in ſuch manner as to comprehend what appears to be the manifeſt intent and deſign of the parties; not paying a nice adherence to the legal ſenſe or operation of the words, which may be made uſe of in framing the articles.

Collect. Jur. v. 2. 374. 2 Atk. 545.

§ 35. Having premiſed theſe general rules, we will proceed to the expoſition of the ſeveral parts of a deed in their order.

Particular Rules.

§ 36. With reſpect to the parties, if ſeveral perſons join in a deed, ſome of whom are capable of conveying or taking, and others incapable; it ſhall enure and be conſtrued as the deed of thoſe only, who are capable of conveying, and to thoſe only who are capable of taking: and the incapacity of ſome of the parties, will not render it invalid as to thoſe who are capable.

Parties. Shep. Tou. 81.

§ 37. Although a tenant for life can only grant his own life eſtate; yet, if he is joined in the conveyance by the remainder-man or reverſioner, they may grant the whole inheritance. Thus, if a tenant for life, and the perſon in remainder or reverſion, join in a feoffment in fee, it will be good: for each paſſes his own

1 Inſt 42 *a.* 45 *a.* 1 Rep. 76 *a.* 6 Rep. 14 *b.*

own eſtate, the tenant for life the freehold in poſſeſſion, and the reverſioner his reverſion.

Recital. Shep. T. 76. 3 Cha. Ca. 101.

§ 38. With reſpect to a recital, although it is not a neceſſary or eſſential part of a deed, yet it may be made uſe of to explain any doubt which may ariſe reſpecting the intention of the parties; but in itſelf it has no effect or operation, nor will it in general amount to an eſtoppel.

Shelley v. Wright, Willes R. 9.

§ 39. In a modern caſe it was reſolved, that a party executing a deed is eſtopped by the recital of a particular fact in that deed, to deny that fact. And therefore, where it was recited in the condition of a bond, that the obligor had received divers ſums of money for the obligee, which he had not brought to account, but acknowledged that a balance was due to the obligee: It was holden that the obligor was eſtopped to ſay that he had not received any money for the uſe of the obligee.

Grant.

§ 40. As to the granting part of a deed, the following rules are to be obſerved:

Shep. Tou. 89.

1ſt, When any thing is granted, all the means to attain it, and all the fruits and effects of it are granted alſo, and ſhall paſs *incluſive*, together with the thing itſelf, without the words "*cum pertinentiis:*" for it is a maxim in law, *cuicunque aliquid conceditur, etiam et id ſine quo res ipſa non eſſe potuit.*

§ 41. Thus,

§ 41. Thus, if a man grants a piece of ground in the middle of his eſtate, he at the ſame time impliedly grants a way to come at it: and the grantee may croſs his land for that purpoſe, without being guilty of a treſpaſs; and, if the grantee is obſtructed, he has a remedy by action. Fitz. N. B. 183.

§ 42. The incidents, which are neceſſary and appendant, will in moſt caſes paſs by the grant of the principal, without the uſual word "appurtenances," but the converſe of this propoſition will not hold: for the principal will not paſs by a grant of the incident. *Acceſſorium non ducit, ſed ſequitur ſuum principale.* 10 Rep. 64.

§ 43. As to the *habendum*, its office is only to limit the certainty of the eſtate granted: and, therefore, it is a rule, that no perſon can take an immediate eſtate by the *habendum* of a deed, when he is not named in the premiſes; for it is in the premiſes of a deed, that the thing is really granted. Habendum.

§ 44. Thus, if lands be given in the premiſes of a deed to a huſband, *habendum* to him and his wife; the wife will take nothing, becauſe ſhe is not mentioned in the premiſes. Brooks v. Brooks, 2 Roll. Ab. 67. Windſmore v. Hobart, Ante f. 28.

§ 45. There are, however, ſome exceptions to this rule: 1ſt, If lands are given in frank marriage, the wife, who is the object of the gift may take by the *habendum*, although ſhe is not named in the premiſes. 2d, A perſon, not named in the premiſes, may take an eſtate in remainder by the *habendum*. 3d, If no 1 Inſt. 21 *a*.

name whatever be mentioned in the premiſes, then a perſon named in the *habendum* may take.

1 Inſt. 7 *a.* n. 3.

§ 46. There is a caſe in 21 & 22 *Eliz.* where the two Chief Juſtices and the Chief Baron certified to the Chancellor, that a leaſe was good, though the leſſee was named in the *habendum* only.

Sammes' Caſe, 13 Rep. 55.

§ 47. In conveyances to uſes, a perſon not named in the premiſes might take by the *habendum*. As where Sir *T. Beckenham*, by indenture between him and *John Sammes* and *George Sammes*, bargained, ſold, enfeoffed, *&c.* to *John Sammes*; to hold to the ſaid *John Sammes* and *George Sammes*, their heirs and aſſigns, to the uſe of them and their heirs for ever: It was reſolved, that, as *George* was not named in the premiſes, he could not take by the *habendum*; but, although the feoffment was good only to *John* and his heirs, yet the uſe, limited to *John* and *George* and their heirs, was good, becauſe the ſeiſin of *John* was ſufficient to ſerve the uſe declared to *George*.

1 Roll. Ab. 65.

§ 48. Nothing can be limited in the *habendum* of a deed, which has not been given in the premiſes; becauſe the premiſes being the part of a deed in which the thing is granted, it follows that the *habendum*, which is only uſed for the purpoſe of limiting the certainty and extent of the thing given, cannot increaſe the gift: for then the grantee would, in fact, take a thing which was never given to him.

§ 49. Thus,

§ 49. Thus, if a man grants a manor to *A. habendum*, together with the advowſon of the church of *D.*; the advowſon, if in groſs, will not paſs, becauſe it was not given in the premiſes. But, if it is an advowſon appendant to the manor granted in the premiſes, it will paſs: for in that caſe, it was included in the grant of the manor. Anon. 2 Roll. Ab. 65.

§ 50. Where the *habendum* is repugnant, and contrary to the premiſes, it is void, and the grantee will take the eſtate given in the premiſes. This rule is a conſequence of the maxim already ſtated, that deeds ſhall be conſtrued moſt ſtrongly againſt the grantor, and therefore that he ſhall not be allowed to contradict or retract by any ſubſequent part of the deed, the gift made in the premiſes. Where repugnant to the Premiſes.

§ 51. Thus, if lands are given in the premiſes of a deed, to *A.* and his heirs, *habendum* to *A.* for life, the *habendum* is void, becauſe it is utterly repugnant to, and irreconcileable with the premiſes. Plowd. 153.

§ 52. In the caſe of things which derive their effect from the delivery of the deed, without other ceremony, and which lie in grant, there the *habendum*, if repugnant to the premiſes, is void. As, if a man grants rent or common out of his land, in the premiſes of a deed, to one and his heirs, *habendum* to the grantee for years or for life, the *habendum* is repugnant and void: for a fee paſſed in the premiſes by the delivery of the deed. 2 Rep. 23 *b*.

2 Rep. 24 *a.*

§ 53. But when, to the eſtate limited by the premiſes, a ceremony is requiſite to the perfection of the eſtate, and to the eſtate limited in the *habendum*, nothing is required to the perfection and eſſence thereof, but only the delivery of the deed; there, although the *habendum* be of a leſſer eſtate than is mentioned in the premiſes, it ſhall ſtand.

Baldwin's Caſe, 2 Rep. 23.

§ 54. Thus, where a perſon by indenture, covenanted, granted, and demiſed, and to farm let, lands, to *Ann Baldwin* and *Anthony* her ſon, and to the heirs of the ſaid *Anthony*, *habendum* to them from the date of the ſame indenture, until the end of ninety-nine years; and ſo on from ninety-nine to ninety-nine years, until three hundred years were expired: no livery of ſeiſin was made according to the ſaid indenture. It was reſolved, that, as livery was neceſſary to perfect the eſtate limited in fee, nothing would have paſſed but an eſtate at will, if the deed had not gone farther; but, as an eſtate for years was limited in the *habendum*, it was good preſently by the delivery of the deed. And ſo it appeared to have been the intention of the parties, that the deed ſhould take effect by the delivery.

Where it enlarges, abridges, or explains the Premiſes. 8 Rep. 154 *b.*

§ 55. There are, however, ſeveral caſes, where the *habendum* is allowed to enlarge, abridge, or explain the premiſes; for it is a rule of conſtruction, that, where a deed firſt ſpeaks in general words, and afterwards deſcends to ſpecial words, if the ſpecial words agree with the general words, the deed ſhall be intended according to the ſpecial words.

§ 56. Thus,

§ 56. Thus, where no eſtate is limited in the premiſes, and an expreſs eſtate for years is limited in the *habendum*, this will qualify the general intendment of the premiſes, by which an eſtate for life would otherwiſe have paſſed. 1 Inſt. 183 *a*. 8 Rep. 154 *b*.

§ 57. The eſtate, given in the premiſes, may be enlarged by the *habendum*. Thus, where an eſtate is given in the premiſes to the grantee for life, *habendum* to him and his heirs, the grantee will take an eſtate in fee; for Lord *Coke* ſays, the *habendum* may enlarge the eſtate given in the premiſes, but not abridge the ſame. 1 Inſt. 299 *a*.

§ 58. Although the nature of the eſtate, given in the premiſes, cannot be entirely altered by the *habendum*; yet it may be qualified by it: for in that caſe there will be no abſolute repugnancy between the premiſes and the *habendum*.

§ 59. Thus, if lands are given in the premiſes, to *A*. and his heirs, *habendum* to him and the heirs of his body, he will only take an eſtate tail; becauſe the *habendum* qualifies and reſtrains the general import of the word "heirs," to the lineal deſcendants of the grantee. 8 Rep. 154 *b*.

§ 60. Lord *Coke* ſays, if lands be given to *B*. and his heirs, if *B*. have heirs of his body, and if he die without heirs, that it ſhall revert to the donor, this is an eſtate tail, and it ſhall revert to the donor. 1 Inſt. 121 *a*.

Thurman's Caſe, 2 Roll. Ab. 68.

§ 61. If a perſon gives lands to *A.* and his heirs, *habendum* to him and the heirs of his body, remainder to a ſtranger in fee; this ſhall qualify and reſtrain the eſtate given in the premiſes, ſo as to reduce it to an eſtate tail: for, otherwiſe, the limitation of the remainder over would be void.

Pilſworth v. Pyet, T. Jones 4.

§ 62. Where lands were granted to *A.* and his heirs, *habendum* to him and his heirs for three lives; the *habendum* was conſtrued, ſo as to abridge the eſtate given in the premiſes to an eſtate for three lives.

1 Inſt. 183 *b.* 190 *b.*

§ 63. If a leaſe be made to two perſons, *habendum* the one moiety to the one, and the other moiety to the other; the *habendum* makes them tenants in common, whereas by the premiſes, they were joint-tenants.

Where it is not controlled by the Premiſes.

§ 64. Where the premiſes and the *habendum* of a deed are equally clear and explicit, the former will not be controlled by the latter, but both will be allowed to have an operation; it being a rule of law, that a deed ſhall be conſtrued in ſuch a manner, that each part of it may be effectual, if they can ſtand together.

8 Rep. 154 *b.*

§ 65. Thus, if lands are given in the premiſes to a perſon and the heirs of his body, *habendum* to him and his heirs, he will take an eſtate tail with a fee ſimple expectant thereon: for it is a maxim, that *generalis clauſula non porrigitur ad ea, quæ antea ſpecialiter ſunt comprehenſa.* And, therefore, when the

deed at firſt contains ſpecial words, and afterwards concludes in general words, both words, as well general as ſpecial, ſhall ſtand.

§ 66. In ſome caſes, a gift to a perſon and his heirs, *habendum* to him and the heirs of his body, has been held to paſs an eſtate tail, with a fee-ſimple expectant. As, where lands were given to huſband and wife and to their heirs, *habendum* to them and the heirs of their bodies; it was held that the grantee took an eſtate tail, with a fee ſimple expectant: but Mr. *Hargrave* has obſerved, that this caſe was attended with circumſtances, particularly ſhewing an intention to paſs both: for there was a reſervation of tenure to the lord paramount, which could not be, if only an eſtate tail paſſed to the donee, and the reverſion had remained in the donor; for then the tenure muſt have been of the donor.

Turnman v. Cooper, Cro. Jac. 476.

1 Inſt. 21 *a.* n. 2.

§ 67. The words, inſerted in the *habendum*, for the purpoſe of ſhewing the quantity of eſtate intended to be given, are called words of limitation; in contradiſtinction to the words in the premiſes, by which the lands are given; and which are called words of purchaſe.

Words of Limitation and Purchaſe.

Thus Mr. *Fearne* ſays,—"In general, words of "purchaſe are thoſe by which, taken abſolutely without reference to, or connection with any other "words, the eſtate firſt attaches, or is conſidered as "commencing in the perſon deſcribed by them; "whilſt words of limitation operate by reference to,

Cont. Rem. 138.

" or connection with other words, and extend or mo-
" dify the estate given by those other words."

Idem 107. § 68. Mr. *Fearne* had previously observed, that, when the word heirs, *&c.* operate only to expand an estate in the ancestor, so as to let the heirs described into its extent, and entitle them to take derivatively through or from him, as the root of succession, or person in whom the estate is considered as commencing, they are properly words of limitation; but when they operate only to give the estate imported by them, to the heirs described originally, and as the persons in whom that estate is considered as commencing, and not derivatively from or through the ancestor, they are properly words of purchase.

§ 69. In some cases, the same words operate as words of purchase, and also as words of limitation. Thus, where lands are limited to *A.* for life, remainder to the right heirs, or heirs of the body of *B.*, these are words of purchase, inasmuch as they describe the persons who are to take the estate in the first instance; and are also words of limitation, for they give an inheritable quality to the estate, and limit the course of descent.

TITLE XXXII.

DEED.

CHAP. XXIV.

The ſame Subject continued.—By what Words different Eſtates may be created.

§ 1. *What Words create an Eſtate in Fee.*
4. *The Word Heirs muſt be uſed.*
8. *Exceptions.*
14. *What Words create an Eſtate Tail.*
25. *Limitation to A. and his Heirs, Remainder over.*
29. *Limitation to A. and his Wife, and the Heirs of the Body of A. or his Wife.*
36. *Effect of a Limitation to the Heirs of the Body of A.*
40. *Uſual mode of limiting Eſtates Tail.*
42. *What Words create an Eſtate for Life.*
43. *What Words create a Joint-tenancy.*
46. *What Words create a Tenancy in common.*
52. *What Words create Croſs Remainders.*
61. *What Words create a Condition.*

Section 1.

What Words create an Eſtate in Fee.

WITH reſpect to the words required by the law, to create an eſtate in fee ſimple, it is laid down by *Littleton*, § 1. and alſo by Lord *Coke*, that in all feoffments and grants, the word *heirs* is abſolutely neceſſary for that purpoſe; and cannot be ſupplied by any other word whatever.

§ 2. Mr. *Madox*, in the diſſertation which he has prefixed to his *Collection of Ancient Charters*, contends, that this maxim is not ſo old as is generally ſuppoſed, for that formerly there were ſeveral modes of expreſ-

ſion by which an eſtate in fee ſimple might have been created, without the word *heirs:* ſuch as to the feoffee *et ſuis*, or, *ſuis poſt ipſum*, or *habendum et jure hereditario perpetuo poſſidendum*. So that it is probable, this maxim was not fully eſtabliſhed until the principles of the feudal law became generally adopted.

1 Inſt. 23 *b.*

Bract. 17 *b.*

§ 3. The form of a gift in fee-ſimple, in *Bracton's* time, was, *habendum tali et hæredibus ſuis de me et hæredibus meis*, or, *tali et hæredibus ſuis, vel cui terram illam dare vel aſſignare voluerit*, with a clauſe of warranty.

The Word Heirs muſt be uſed.

Tit. 11. ch. 4. ſ. 2.

§ 4. It may, however, be now laid down as a general rule, that in all feoffments and grants to natural perſons, and alſo in all conveyances deriving their effect from the ſtatute of uſes, no other word but the word heirs, however ſtrong the intention may appear, will create an eſtate in fee-ſimple. And it is obſervable, that there is really no other word in the *Engliſh* language expreſſive of all the circumſtances which conſtitute the idea of an heir.

Plowd. 28. 1 Inſt. 8 *b.*

§ 5. A gift to a man, *et hæredibus*, with livery of ſeiſin, though the word *ſuis* be omitted, will paſs an eſtate in fee-ſimple; becauſe livery of ſeiſin ſhall be taken moſt ſtrongly againſt the perſon who makes it.

Idem n. 4.

§ 6. It is ſaid by Lord *Coke*, that if lands are given to a man and to his heir, in the ſingular number, he will not take an eſtate in fee. But Mr. *Hargrave* obſerves, that, according to many authorities, heir may be

be *nomen collectivum*, and operate in the ſame manner as heirs in the plural number.

§ 7. It was determined in a modern caſe, that the words, to the uſe of all and every the child or children, equally, ſhare and ſhare alike, if more than one as tenants in common, and not as joint-tenants, and if but one child, then to ſuch only child, his or her heirs or aſſigns for ever, ſhould be conſtrued ſo as to create an eſtate in fee in all the children; the words his or her heirs being allowed to operate as words of limitation on all the preceding words in the ſentence. Doe v. Martin, 4 Term R. 39.

§ 8. The rule, that the word heirs is abſolutely neceſſary to create an eſtate in fee-ſimple, admits of a few exceptions. Thus, if a father enfeoffs his ſon, to hold to him and his heirs, and the ſon re-enfeoffs the father as fully as the father enfeoffed him, an eſtate in fee-ſimple will paſs; for, in this caſe, the mind is carried to the idea of an heir, as clearly as if the word heir had been inſerted in the feoffment. Exceptions. 1 Inſt. 9 *b*. n. 6.

§ 9. If one coparcener or joint-tenant releaſes all his right to the other, it will paſs a fee, without the word heirs. Idem.

§ 10. So, if one coparcener grants a rent to the other, for owelty or equality of partition, an eſtate in fee-ſimple in the rent will paſs, without the word heirs; for, as the rent comes in lieu of the inheritance, it has as ſtrong a relation to the inheritance as if the word heirs had been mentioned. Id. 10 *a*.

§ 11. In

Ante ch. 8. f. 23.

§ 11. In releaſes that enure by way of *mitter le droit*, we have ſeen, that the word heirs is not neceſſary to create an eſtate in fee-ſimple.

1 Inſt. 9 *b.*

§ 12. In conveyances to corporations, whether ſole or aggregate, the word heirs is not neceſſary to create an eſtate in fee-ſimple. But the law makes a diſtinction between a coporation aggregate and a ſole coporation, for a feoffment to a corporation aggregate will paſs a fee-ſimple, without any words of limitation whatever; whereas, in a feoffment to a corporation ſole, an eſtate in fee will not paſs without the word ſucceſſors.

1 Inſt. 9 *b.*

§ 13. In a grant to the king, an eſtate in fee-ſimple will paſs without either the word heirs or ſucceſſors; partly, on account of his prerogative, and, partly, becauſe, in judgment of law, the king never dies.

What Words create an Eſtate Tail. 1 Inſt. 20 *a.*

§ 14. With reſpect to the words which are neceſſary to create an eſtate tail in a deed, it is ſaid by Lord *Coke*, that the word heirs is as neceſſary to the creation of an eſtate tail, as to that of an eſtate in fee-ſimple; for, as every eſtate tail was a fee-ſimple at common law, and as no fee-ſimple could be created without the word heirs, it follows, that an eſtate tail could not be created without that word.

1 Inſt. 20 *b.* Nevel v. Nevel, 1 Roll. Ab. 387.

§ 15. Lord *Coke* ſays, if a perſon gives lands or tenements to a man *et ſemini ſuo*, or *exitibus vel proli-bus de corpore ſuo*, to a man and to his ſeed, or to the iſſues or children of his body, he hath but an eſtate for life;

life; for, although the ſtatute *De Donis* provides, that the will of the donor ſhall be obſerved, yet that will and intent muſt agree with the rules of law. And *Littleton*, in his reading on this ſtatute, holds, that a gift to man *et exitibus de corpore ſuo legitime procreatis*, or *ſemini ſuo*, only paſſes an eſtate for life. This doctrine is ſtill held to be law, the word iſſue never having been allowed to operate in a deed as a word of limitation.

Makepeace v. Fletcher, Com. R. 457. 4 Veſ. Jun. 794.

§ 16. No technical words are, however, required, to reſtrain the general import of the word heirs to the immediate deſcendants of the body of the donee, and, therefore, any words that ſhew the intention of the grant, will be ſufficient for that purpoſe.

§ 17. Lord *Coke* ſays, if lands be given to *B. et hæredibus quos idem B. de prima uxore ſua legitime procrearet*, this is a good eſtate in ſpecial tail, although he has no wife at the time, without the words *de corpore*. So it is, if lands be given to a man and to his heirs which he ſhall beget of his wife; or to a man *et hæredibus de carne ſua*; or to a man *et hæredibus de ſe*: in all theſe caſes, an eſtate tail is created, though the words *de corpore* are omitted.

1 Inſt. 20 *b.*

§ 18. Lord *Coke* alſo ſays, that the word *engendres*, or begotten, may be omitted: and if the word be *procreandis*, or *quos procreaverit*, the eſtate tail is good: and, as *procreatis* ſhall extend to the iſſues begotten afterwards, ſo, *procreandis* ſhall extend to the iſſues begotten before. Lord *Hale* has obſerved on this paſſage, that

Idem n. 3.

that where the words were, *in posterum procreandis*, ſons born before ſhall be excluded, on account of the peculiar force of *in posterum*.

Ch. 23. f. 59.

§ 19. It has been ſtated, that where lands are given in the premiſes of a deed to *A.* and his heirs, *habendum* to him and the heirs of his body, he will only take an eſtate tail.

Bro. Ab. Tit. Deviſe 1.

§ 20. *Littleton* ſays, if lands are given to a man and his heirs males, or to a man and his heirs females, the donee will take an eſtate in fee; becauſe the gift does not ſpecify from what body the heirs male or female ſhall iſſue.

Abraham v. Twigg. Cro. Eliz. 478.

§ 21. A feoffment was made to the uſe of the feoffee and his heirs of his body, and, for default of ſuch iſſue, to *G. D.*, and to his heirs males lawfully engendered, and, for default of ſuch iſſue, to the right heirs of the feoffor. All the Judges were of opinion, that *G. D.* took an eſtate in fee; and that it could not be an eſtate tail, becauſe there was not any *body* from whom his heir male ſhould come.

§ 22. But if there be any other words in a gift of this kind, from which an intention to reſtrain the generality of the words heirs males to the body of the grantee can be inferred, ſuch gift will be conſtrued to paſs an eſtate tail.

Beresford's Caſe, 7 Rep. 41.

§ 23. A feoffment was made to the uſe of the feoffor for life, remainder to the uſe of *George Beresford*, ſon and

and heir of the feoffor, and the heirs male[illegible] to the heirs body lawfully begotten; and for default of such [illegible] there to the uſe of *Aden Beresford*, and the heirs males of the ſaid *Aden Beresford* lawfully begotten; and, for default of ſuch iſſue, to the uſe of *Thomas Beresford*, &c.

The queſtion was, what eſtate *Aden Beresford* took; and it was contended, upon the authority of *Abraham* v. *Twigg*, that he took an eſtate in fee-ſimple. But it was reſolved by the court, that *Aden* took only an eſtate tail, becauſe there were words equivalent to the words *de corpore*. Ante f. 21.

§ 24. Lord *Coke* ſays, if lands are given to *A. et haredibus de corpore ſuo*, remainder to *B. in forma prædicta*, this is a good eſtate tail to *B.*, for that *in forma prædicta* includes the other. If a man letteth lands to *A.* for life, remainder to *B.* in tail, remainder to *C. in forma prædicta*, it is void for the uncertainty; but if it had been *in eadem forma*, this had been a good eſtate tail; for, *idem ſemper proximo antecedenti refertur*. 1 Inſt. 20 *b*.

§ 25. It is laid down by *Hales* Juſtice, *arguendo*, in 4 *Edw.* 6., that if land is given to one and to his heirs, and if the donee die without heir of his body, that it ſhall remain to another, this ſhall be a good tail by the equity of the ſtatute, although it be out of the words: and this doctrine has been confirmed by ſeveral caſes. Limitation to *A.* and his Heirs. Remainder over. Plowd. 55. Vide Tit. 2. Ch. 1. f. 19.

§ 26. A feoffment was made to the firſt ſon who ſhould have iſſue, and to his heirs, and, for default of ſuch Beck's Caſe, Lit. Rep. 344.

that [illegible] This was held to be an

[illegible] is made to the uſe of the feoffor [illegible] the uſe of his ſon *Thomas*, and [illegible] and, for default of iſſue of the [illegible] *homas*, to the uſe and behoof of the [illegible]e feoffor. The court ſaid, that the [illegible] feoffor was plain, that an eſtate in fee ſhould [illegible] is to his ſon. It was no more than if a gift had been made to a man and his heirs, *viz.* to the heirs of his body. And judgment was given, that it was only an eſtate tail.

Idle v. Cook, 1 P. Wms. 70.

§ 28. In a ſubſequent caſe, where lands were limited to the uſe of *Valentine* and *Alice* his wife, *pro et durante termino vitarum ſuarum, et hæredum et aſſignatorum prædictorum Valentini et Aliciæ, et pro defectu talis exitus*, to the uſe of the right heirs of the grantor for ever. It was held by Lord Chief Juſtice *Holt*, *Powis*, and *Powell*, that this was an eſtate in fee; contrary to the opinion of *Gould*, who thought it ſhould be conſtrued an eſtate tail, that being the intent of the grantor.

Limitation to *A.* and his Wife and the Heirs of the Body of *A.*, or of his Wife. Lit. ſ. 26, 27, 28.

§ 29. *Littleton* ſays, if tenements be given to a man and his wife, and to the heirs of the body of the man, in this caſe, the huſband hath an eſtate in general tail, and the wife an eſtate for term of life. Alſo, if lands be given to the huſband and wife, and to the heirs of the huſband which he ſhall beget on the body of his wife, in this caſe, the huſband hath an eſtate in ſpecial tail, and the wife but an eſtate for life. And if the gift be

be made to the husband and to his wife, and to the heirs of the body of the wife by the husband begotten, there the wife hath an estate in special tail, and the husband but for term of life. But if lands be given to the husband and the wife, and to the heirs which the husband shall beget on the body of the wife, in this case, both of them have an estate tail; because this word, heirs, is not limited to the one more than to the other.

§ 30. Lord *Coke* has observed on this passage, that the word heirs is *nomen operativum*, to which of the donees it is limited, it createth the estate tail: but if it incline no more to the one than to the other, then both do take; and therewith accords the case 3 *Edw.* 3., where it appeared, *quod Robertus De S. dedit Johanni De Ripariis et Matildæ uxori ejus, et hæredibus quos idem Johannes de corpore ipsius Matildæ procrearet, &c;* and this was adjudged to be an estate in special tail in them both, because the estate was equally tailed to the heirs of the baron, as to the heirs of the wife. 1 Inst. 26 *a.* n. 3.

§ 31. In conformity to the above passages, it has been long established, that where a limitation is made to the heirs *of* the body of the wife by the husband to be begotten, the wife will take an estate tail. But if the words are to the heirs *upon* or *on* the body of the wife, by the husband to be begotten, both husband and wife take an estate tail. Fearne Cont. Rem. 45.

§ 32. Thus, where the limitation was to the husband and wife for their lives, remainder to the first and Repps v. Bonham, Yelv. 131.

other ſons of the body of the wife, remainder to the heirs of the body of the wife by the huſband to be begotten, it was held an eſtate tail in the huſband. But the court ſaid, if it had been to the heirs which the huſband ſhall beget *on* the body of the wife, it would have created an eſtate tail in both; for which, was cited 19 *Hen.* 6. 75 *a.* giving the ſame reaſon as *Littleton* does, becauſe the word heirs is indifferently limited to both.

Goſſage v. Taylor, Sty. 325.

§ 33. *A.* levied a fine to the uſe of himſelf for life, then to his ſon for life, then to the uſe of the intended wife for life, remainder to the uſe of the heirs to be begotten upon the body of the wife by the ſon. It was adjudged, that the word heirs ſhould be applied to the heirs of both parties, and, therefore, they both took eſtates tail.

Merrel v. Rumſey, 3 Salk. 338.

§ 34. By a marriage ſettlement and fine levied to the uſe of huſband and wife for their joint lives, remainder to the heirs of the body of the wife by the huſband begotten, remainder (the wife ſurviving the huſband) to her for life, remainder to the right heirs of the huſband. *Per curiam*, this is an eſtate tail executed in the wife.

Denn v. Gillot, 2 Term R. 431.

§ 35. A perſon, in conſideration of marriage, covenanted to ſtand ſeiſed to the uſe of himſelf and *Mary* his intended wife for their natural lives, and the life of the longer liver of them, remainder to the uſe of the heirs *on* the body of the ſaid *Mary* by the ſaid huſband lawfully to be begotten. Mr. Juſtice *Aſhurſt* ſaid, the queſtion

queſtion depended on poſitive determinations, rather than on reaſoning: if the words of the limitation had been, "the heirs *of* the body of the wife by "the huſband to be begotten," the caſes would be in favour of the plaintiff: but, as the word is *on*, and not *of*, all the determinations are the other way; particularly thoſe in 3 *Edw.* 3., and in *Styles*. If we are at liberty to go into the intention of the parties, I ſhould have been inclined to have read the word *of* inſtead of *on*, becauſe the wife ought to be conſidered as a purchaſer; but we are tied down by expreſs authorities.

It was unanimouſly reſolved, that this was a joint eſtate tail in the huſband and wife.

Effect of a Limitation to the Heirs of the Body of *A.*

§ 36. An eſtate tail may be created by a limitation to the heirs of the body of *A.*, provided *A.* be dead when the limitation takes effect, and will veſt in the perſon anſwering the deſcription of ſuch ſpecial heir; and, in caſe of his death without iſſue, will go to the perſon who would be entitled to ſuch eſtate, if it had originally veſted in the anceſtor of the firſt taker.

Mandevill's Caſe, 1 Inſt. 26 *b.* Id. 220 *a.*

§ 37. *John De Mandevill*, by his wife *Roberge*, had iſſue *Robert* and *Mawde*. *Michael De Merwell* gave certain lands to *Roberge*, and to the heirs of *John Mandevill* her late huſband, on her body begotten; and it was adjudged, that *Roberge* had an eſtate but for life, and the fee-tail veſted in *Robert*, (heirs of the body of his father being a good name of purchaſe); and that, when he died without iſſue, *Mawde* the

Southcot v. Stowell, 2 Mod. 207.

daughter was tenant in tail, as heir of the body of her father, *per formam doni.*

Cont. Rem. 110.

§ 38. Mr. *Fearne* obſerves, that this devolution, after the deceaſe and failure of iſſue male of the firſt ſpecial heir of *B.*, to other heirs equally falling within the ſame deſcription, has been ſtiled a deſcent *per formam doni.* But this ſort of acquiſition of, or ſucceſſion to, an eſtate tail, by the heirs male of the body of *A.* in a collateral line between themſelves, is not ſtrictly a deſcent; nor does it operate as a purchaſe. It is not ſtrictly or completely a deſcent, becauſe the eſtate never attached, or by poſſibility could attach in the anceſtor, or be derived from or through him. It has not the effect of a purchaſe, becauſe the eſtate goes in the ſame courſe of ſucceſſion as it would have done under a deſcent, excluſive of perſons to whom it would have gone, if the heirs male had taken abſolutely by purchaſe.

Id. 112.

§ 39. In a ſubſequent paragraph, Mr. *Fearne* ſays, "It ſeems, in truth, of a compound or intermediate "deſcription betwixt a deſcent and a purchaſe. In "point of acquiſition, it has the quality of the latter, "as not being derived from or through the anceſtor. "But, in regard to its courſe of devolution, it is re- "ferrable to the former, as purſuing the very ſame "channel of tranſmiſſive ſucceſſion. It is a ſort of "intail, which, though it firſt attaches in the ſpecial "heir, according to the nature of the deſcription, yet "terminates not in him and his repreſentatives, of

"the

" the ſpecies denoted, but continues its progreſs " through the whole race of heirs deſcribed, in the " ſame courſe as if it had been an eſtate veſted in the " anceſtor, deſcendible from him to his heirs, of that " deſcription."

Uſual Mode of limiting Eſtates Tail.

§ 40. The uſual mode of limiting eſtates tail in modern conveyances, is, to the uſe of the firſt ſon of the body of the ſaid *A. B.* on the body of the ſaid *C. D.* lawfully begotten, and the heirs male of the body of ſuch firſt ſon lawfully iſſuing; and, for default of ſuch iſſue, to the ſecond, third, and all and every other the ſon and ſons of the body of the ſaid *A. B.* on the body, *&c.* lawfully to be begotten, ſeverally, *&c.* and of the ſeveral and reſpective heirs male of the body and bodies of all and every ſuch ſon and ſons iſſuing; and, for default of ſuch iſſue, *&c.*

Owen v. Smith, 2 H. Black. Rep. 594.

§ 41. In a modern caſe, there was a limitation in a feoffment to the uſe of *Nicholas Smyth* for life, remainder to the uſe of the firſt ſon of the body of *Nicholas Smyth* lawfully iſſuing; and, for default of ſuch iſſue, to the uſe and behoof of the ſecond, third, fourth, and of all and every other ſon and ſons of *Nicholas Smyth* lawfully iſſuing, ſeverally and ſucceſſively in remainder, *&c.* and of the ſeveral heirs male of the body and bodies of all and every ſuch ſon and ſons reſpectively iſſuing, *&c.* Upon a caſe ſent from the Court of Chancery to the Common Pleas, reſpecting the eſtate which the eldeſt ſon of *Nicholas Smyth* took under this limitation, Lord Chief Juſtice *Eyre* ſaid:— " I think this is one of the cleareſt caſes I ever ſaw: " there

" there is demonſtration plain on the face of the feoff-
" ment, that it was the intent of the parties that an
" eſtate tail ſhould be limited to the eldeſt ſon of *Ni-*
" *cholas Smyth:* the argument, on the part of the de-
" fendant, has occaſionally ſhifted; ſometimes admit-
" ting the intent, but contending, that the words uſed
" were not ſufficient to effectuate that intent, which I
" thought was the true way of conſidering the queſ-
" tion, and ſometimes denying the intent itſelf. But
" no man can read this deed without ſeeing the intent
" I have mentioned; though, by ſome ſtrange blun-
" der, the uſual words are omitted. If, indeed, it had
" ſtopped at the limitation to the firſt ſon of *Nicholas*,
" I ſhould have agreed with the counſel for the de-
" fendant: for it certainly does not follow, that, be-
" cauſe we can ſee an intent on the face of a deed,
" therefore that the words uſed are ſufficient to effec-
" tuate that intent. But the intent here, does not
" reſt on the firſt expreſſions; but the other parts of
" the deed, reſpecting the truſts and other limitations,
" refer to an eſtate tail in the firſt ſon of *Nicholas*
" *Smyth.* The intent, then, being plain, the queſtion
" is, whether we can find ſufficient words? I, for
" one, adhere to the rule, which forbids the raiſing
" eſtates by implication in deeds; and think that we
" ought not to grant the ſame indulgence to inaccuracy
" in the conſtruction of deeds, as we do in wills.
" But, here, it is not neceſſary to reſort to implica-
" tion, or to enquire whether the ſame latitude is to
" be allowed to conveyances to uſes, as to wills: for,
" here, there are ſtrict technical words, capable of
" being applied to the limitation of the firſt ſon of the

body

" body of *Nicholas Smyth*, ſo as to give him an eſtate " tail. The limitation is to the firſt ſon; and, for de- " fault of ſuch iſſue, the whole line of ſons is taken " in, without any particular limitation to them and " the heirs of their bodies *nominatim*; but it is " to " the ſeveral heirs male of the body and bodies of all " and *every ſuch* ſon and ſons reſpectively iſſuing." " Fortunately it is not ſaid, " to the heirs male of the " body and bodies of *ſuch ſecond*, *third*, and other " ſons, *&c.*" If it had been ſo, it could not, per- " haps, have been got over. But the limitation is to " the heirs male of the body and bodies of " *every* " *ſuch ſon.*" Now, the caſe of *Doe* v. *Martin*, is an " authority to warrant the application of thoſe words " to the limitation of the firſt ſon of *Nicholas Smyth*, " as well as to the others. But this caſe is ſtronger " than *Doe* v. *Martin*: for it does not even require " the aſſiſtance of punctuation. Upon the whole, " therefore, it is clear, that the plaintiff took an " eſtate tail under the limitation in the deed to the " firſt ſon of the body of *Nicholas Smyth.*"

Ante f.

The certificate accordingly ſtated, that the plaintiff took an eſtate in tail male, in the lands in queſtion.

What Words create an Eſtate for Life.

§ 42. With reſpect to the words which are neceſſary to create an eſtate for life, thoſe uſually inſerted for that purpoſe, are—to hold to the ſaid *A. B.* and his aſſigns, for and during the term of his natural life. But it has been already obſerved, that if a feoffment be made to a natural perſon, without any words of limitation whatever, the feoffee will take an eſtate

Ante ch. 23 f.

Tit. 3. f. 5.

for his own life, unleſs the feoffor be only tenant in tail, or tenant for his own life, in which caſes the feoffee will take an eſtate for the life of the grantor only.

What Words create a Joint-tenancy. Tit. 18. ch. 1. ſ. 3. Sammes' Caſe, 13 Rep 55.

§ 43. With reſpect to the words which are neceſſary to create a joint-tenancy, it has been already ſtated, that where lands are granted to two or more perſons, to hold to them and their heirs, or for term of their lives, or for term of another's life, without any reſtrictive, excluſive, or explanatory words, all the perſons named in ſuch inſtrument, to whom the lands are ſo given, take an eſtate in joint-tenancy.

Ward v. Everett, 1 Ld. Ray. 422.

§ 44. Sir *Robert Car* granted an annuity or annual rent of 100 *l.* to five perſons for their lives, and the life of the ſurvivor, to be equally divided among them, *viz.* 20 *l.* for each of them during their lives, and after that the firſt of them ſhould die, that her part ſhould be divided equally among the ſurvivors. It was reſolved that this was a joint-tenancy.

Staples v. Maurice, 4 Bro. Par. Ca. 580.

§ 45. Sir *Robert Staples* covenanted in conſideration of marriage, to lay out 2000 *l.* in the purchaſe of lands of inheritance, to be ſettled to the uſe of himſelf for life, remainder to his intended wife for life, remainder to the uſe of their heirs of both their bodies. And covenanted that the leaſes for years, whereof he was then poſſeſſed, ſhould be to the uſe of himſelf for life, and after his deceaſe to the uſe of and in truſt for the children of the ſaid Sir *Robert*, begotten on the body of his ſaid intended wife. It

was decreed by the Court of Exchequer, in *Ireland*, that the children of Sir *Robert Staples* took as tenants in common. But this decree was reverſed by the Houſe of Lords; where it was held that they took as joint-tenants.

What Words create a Tenancy in Common.

§ 46. With reſpect to the words which are neceſſary to create a tenancy in common, the firſt and moſt uſual mode of raiſing an eſtate of this kind, is, by limiting an eſtate to any number of perſons, to take expreſsly as tenants in common, and not as joint-tenants. The ſecond is, by limiting one moiety or third, to one of the grantees, another moiety or third to another of the grantees, and ſo on.

Tit. 20. f. 8. Vide ante ch. 23. f.

2 Vent. 365. Hamel v. Hunt, Prec. in Cha. 164.

§ 47. Where an eſtate is limited to two or more perſons, equally divided, or equally to be divided, theſe words will create a tenancy in common.

Fiſher v. Wigg, 1 P. Wms. 14. 1 Ab. Eq. 291.

§ 48. A perſon ſurrendered a copyhold eſtate to the uſe of his wife for life, and after her death to the uſe of his three younger ſons and two daughters, equally to be divided, and their reſpective heirs and aſſigns for ever. The queſtion was, whether theſe words created a tenancy in common or a joint-tenancy.

Gould, Juſt.—The ſons and daughters take as tenants in common, and not as joint-tenants. In the conſtruction of deeds this rule is to be obſerved, *viz.* to make all parts of them take effect, according to the intent of the parties, ſo as it be not contrary to the rules of law; and it will not be inconſiſtent with any

rule of law to conſtrue this a tenancy in common, the words upon which we are to judge being, not words of limitation or creation of an eſtate, but of qualification and correction. There are no preciſe words requiſite to make a tenancy in common; the words, equally to be divided, go to the quality of the eſtate, and not to the limitation of it, a joint eſtate in the premiſes may be altered by the *habendum*. The intention of the ſurrenderor was to make a proviſion for his younger children and their heirs, which will not take effect if it be a joint eſtate. Surrenders of copyhold lands, to uſes, ſhall have the ſame favourable conſtruction as wills, and are not to be tied up to the ſtrict rules of the common law, but expounded according to the intent.

Tourton, Juſt.—Of the ſame opinin.

Holt, Ch. Juſt. *contra.*—Surrenders of copyholds muſt be governed by the ſame rule as conveyances at common law. By this ſurrender, the ſons and daughters are joint-tenants, not tenants in common; for the words, equally to be divided, ſignify no more than the law would have implied without them, and therefore they can have no operation. The true difference between joint-tenants and tenants in common is, that joint tenants hold by one title, and tenants in common by ſeveral titles. In this caſe the title is joint, and all claim under the ſame conveyance; the word equally does not alter the manner of taking the profits. Judgement that the eſtate was a tenancy in common.

§ 49. A perſon by deed poll, gave, granted, and confirmed, in conſideration of natural love and affection, to his two daughters, the rents and profits of certain lands during the life of his wife, equally to be divided between them, paying five ſhillings *per annum* to his wife, and after her deceaſe, his two daughters to have the ſaid lands to them and their heirs for ever, equally to be divided between them.

Rigden v. Vallier, 2 Veſ. 252.

Lord *Hardwicke* ſaid, there was no ſolemn determination that he could find, that, equally to be divided, would not make a tenancy in common in a deed, though it was ſaid over and over again, to be ſufficient in a will, though not in a deed. The only ſolemn determination then was, *Fiſher* v. *Wigg*, which was relied on, that in a ſurrender of copyhold to uſes, thoſe words made a tenancy in common; but it was objected to as a doubtful authority, as but the opinion of two Judges, againſt ſo great a man as *Holt*. And it was further ſaid to be apprehended, that judgment was reverſed. On ſearch, he could not find it to be ſo, or that a writ of error was brought; ſo that judgment ſtood, and was ſo far an authority, that, that was the conſtruction in the caſe of a ſurrender of copyhold lands. On the beſt conſideration he was inclined to be of opinion, in this caſe, that it was a tenancy in common, and that it would be a direct contradiction to the manifeſt intent of this father, who was providing for his children, to ſay otherwiſe. He had conſidered the arguments in *Fiſher* and *Wigg*, and it was truly ſaid at the bar, that there was nothing more to be ſaid on either ſide, than was ſaid there.

Though

Though no one had more reverence for the opinion of Lord *Holt* than he had, yet he thought the arguments of the other Judges more founded on the nature and reaſon of the thing, and that *Holt*'s was more founded on artificial arguments of the law, and drawn out from a great deal of fine learning, from arguments in other caſes. *Gould*'s argument had great weight, and was not to him ſatisfactorily anſwered.

Decreed to be a tenancy in common.

Goodtitle v. Stokes, 1 Wilſ. R. 341.

§ 50. *John Gurl*, by indentures of leaſe and releaſe, conveyed the lands in queſtion to truſtees, to the uſe of himſelf and his wife for life, remainder to the uſe all and every the children of *John Gurl*, and their heirs, equally to be divided amongſt them.

The queſtion was, whether by the words equally to be divided amongſt them, they ſhould take as tenants in common, or as joint-tenants.

Lord Chief Juſtice *Lee* delivered the unanimous opinion of the court, that this being a deed of uſes, muſt be conſtrued according to the intent of the parties, which moſt plainly was, that the children ſhould take in common. And they relied on the caſe of *Fiſher* v. *Wigg*, which his Lordſhip obſerved, was never reverſed, notwithſtanding what was ſaid in 1 *Ab. Eq.* 291.

His Lordſhip alſo cited the caſe of *Rigden* v. *Vallier*. And judgment was given that the words equally to be divided, in a deed of uſes, created a tenancy in common.

§ 51. In

§ 51. In a modern case, Lord *Mansfield* said, the opinion of the two Judges, in *Fisher* v. *Wigg*, who differed from *Holt*, appeared to be the better one, more liberal, and better founded in law. And Mr. Justice *Aston* observed, that the words equally to be divided, had been determined to be a tenancy in common in a deed. Cowp. R. 660.

§ 52. When lands are given in undivided shares to two or more persons, for particular estates, so as that upon the determination of the particular estates, in any of those shares, they remain over to the other grantees, and the remainder-man or reversioner is not let in till the determination of all the particular estates, then the grantees take their original shares as tenants in common, and the remainders limited among them, on the failure of the particular estates are known by the appellation of cross remainders. But no technical words are required to create cross remainders; any form of words, which sufficiently indicate the intention of the parties, will be sufficient for this purpose, What Words create Cross Remainders. 1 Inst. 195 *b.* n. 1.

§ 53. The limitations in a deed were to trustees, to the use of *A.* and *B.* for their lives, remainder to the use of the child or children of *B.* in tail, as tenants in common; and, in case any such child or children should die without issue of his or her, or their bodies, then the part of such child should be and remain to the use of the surviving child or children of *B.* and the heirs of his, her, or their bodies, issuing; and, in case Doe v. Wainwright, 5 Term. Rep. 427.

caſe all the ſaid children ſhould die without iſſue, then to *A.* in fee.

Lord *Kenyon.*—" This caſe does not involve any " queſtion reſpecting the raiſing of limitations by im- " plication; becauſe the deed, on which the queſtion " ariſes, contains expreſs limitations by way of croſs " remainders, not indeed in the formal language uſed by " conveyancers, but in terms ſufficiently denoting that " it was the intention of the parties to the deed, that " there ſhould be croſs-remainders as to ſome of the " children. Therefore all the caſes, which were cited " by the defendant's counſel, to ſhew that croſs- " remainders in a deed cannot be raiſed by implica- " tion, may fairly be laid out of the caſe; becauſe " this caſe, when conſidered, does not reſolve itſelf " into any queſtion of that kind. No technical pre- " ciſe form of words is neceſſary to create croſs- " remainders: it is ſufficient to ſay that there ſhall be " croſs-remainders; though, in the verboſeneſs of " conveyancers, an abundance of words is generally " introduced in deeds for this purpoſe. Here the " ſingle queſtion ariſes upon the meaning of the " word "*ſurviving*;" which, indeed, is the only " word that diſtreſſes the caſe. But, taking the " whole context together, I do not think that word " renders the caſe doubtful. The fair conſtruction of " that word, ſtanding in the context, is, that, on the " death of one child without iſſue, that portion ſhall " go to the ſurviving line of heirs, and not merely to " one child ſurviving: it muſt go to the ſurviving " children in their own perſons, if living, or if dead " to

" to their iſſues; and, in putting this conſtruction, I " do not think we proceed on conjecture merely: " for the conſtruction of the ſentence is, and in caſe " *all* the ſaid children ſhould die without iſſue, then " the remainder is limited to *A.* in fee. We cannot " give effect to the word *all*, without determining that " there muſt be croſs-remainders, not only as long as " the individual children, but as long as the ſeveral " lines of thoſe children exiſt. Therefore the ſhare " of *J. W.*, which went over on his death without " iſſue, went to the only ſurviving child, and the " heirs of the body of the other child, who was at " that time dead, having left iſſue, as tenants in com- " mon. The whole context requires this conſtruc- " tion; and the laſt clauſe cannot be ſatisfied without " any other."—The other Judges agreed.

§ 54. It is a fundamental rule of law, that croſs-remainders cannot be implied in a deed: and Mr. Serjeant *Williams* obſerves, the reaſon of this rule is to be found in the caſe of *Nevell* v. *Nevell*; where it is ſaid, that if a man make a feoffment in fee to the uſe of *J. S.* and *J. D.* and the heirs males of their bodies; and, for default of iſſue of either of them, to the uſe of the ſurvivor of them, having iſſue male, and to the iſſue male of ſuch iſſue male; and, for default of iſſue male of their body, remainder to another. By this gift, *J. S.* and *J. D.* have ſeveral inheritances; and no croſs-remainder is raiſed by the words after, for want of the word *heirs*: for, though it be by way of uſe, yet an eſtate tail cannot be raiſed without the word *heirs*.

1 Saund. R. 185 *n.* 1 Roll. Ab. 387.

§ 55. In

Cole v. Levingston, 1 Vent. Rep. 224.

§ 55. In ejectment upon a long and special verdict, the following points were resolved by the court, and declared by Lord *Hale* as the opinion of himself and the rest of the Judges:

That, where one covenants to stand seised to the use of *A.* and *B.* and the heirs of their bodies, of part of his land, and, if they die without issue of their bodies, then to remain, *&c.*, and of another part of his land to the use of *C. D.* and *E.*, and the heirs of their bodies; and, if they die without issue of their bodies, then to remain, *&c.* that, here, there are no cross-remainders created by implication; for there never shall be such remainders upon the construction of a deed, though, sometimes, there are, in the case of a will.

Doe v. Dovell, 5 Term Rep. 518.

§ 56. *A.*, a grandfather, after the marriage of his son *B.*, who had two children then living, conveyed lands by deed to trustees, to the use of himself for life; remainder to *B.* for life; remainder to trustees to preserve contingent remainders; remainder to the use of such child or children of *B.*, and in such shares, *&c.* as *B.* should appoint; and, in default of appointment, "to the use of all and every the children of *B.*, and "the heirs of their several and respective bodies, as "tenants in common; but, if only one child, to the "use of such only child, and the heirs of his, her, "or their body; remainder to the right heirs of *A.* in "fee." *B.* had other children, and died without having made an appointment. It was held, that *B.*'s children took vested interests as tenants in tail, and that

that there were no croſs-remainders between them; but, on the death of each child without iſſue, his ſhare fell into the reverſion.

§ 57. By a ſettlement, made previous to a marriage, lands were limited to the uſe of all and every the daughter and daughters of the body of the huſband on the body of the wife to be begotten, ſhare and ſhare alike, equally to be divided between them, and of the heirs of the body and bodies of all and every ſuch daughter and daughters lawfully iſſuing; and, for default of ſuch iſſue, to the uſe of the right heirs of the huſband.

Doe v. Worſley, 1 Raſt. R. 416.

A queſtion aroſe upon this ſettlement, whether there were croſs remainders between the daughters or their iſſue.

Lord *Kenyon* obſerved, "that this was the caſe of "a deed; in which, by the practice of centuries, no "ſuch implication can be raiſed. And it would be "of moſt dangerous conſequence to have this point "diſputed, upon which ſo many titles muſt depend.

"It is probable, that it was intended, that no part "of the ſettled eſtate ſhould go over as long as there "were any iſſue of the marriage remaining; but the "parties have not ſaid ſo. There are certain words "uſed to expreſs ſuch an intention in deeds, which "are well known: thoſe have not been adopted in "the preſent caſe, but the framers of this ſettlement "have left that intention to be implied from other "words,

" words, which cannot be done. I will not go through " all the cases, because they are collected with great " ability by Mr. Serjeant *Williams*, in a note in his
Saund. Rep. 185. n. 6. " edition of *Saunder's Reports*, to which I refer in " general. They establish the proposition I have be- " fore laid down, in respect to the construction of " deeds, which never has or can be suffered to be " doubted, without affecting an infinite proportion of " the property of the kingdom, and removing land- " marks."

Mr. Justice *Lawrence* observed, " that, in order to " raise cross-remainders in a deed between the issue of " the first takers, there must be a limitation to the " heirs of the body, which is not necessary in a will. " And Mr. Justice *Le Blanc* remarked, that it was not " sufficient in a deed, that one may collect such an in- " tention of the parties from the words; but cross- " remainders must be expressly limited by proper " words of conveyance."

It was resolved, that no cross-remainders were created in this case.

West v. Erissey, 2 P. Wms. 349. § 58. In the case of marriage articles, the construction is different; because the particular or technical words, made use of in marriage articles, are of no signification, any more than as they serve to convey the general intention of the parties.

Twisden v. Lock, Amb. 663. § 59. By articles, entered into previously to a marriage, the intended husband covenanted to transfer stock

ſtock to truſtees, to be laid out in the purchaſe of land, to be ſettled to the uſe of the huſband and wife for their lives; and, after the death of the ſurvivor, to the uſe of all the children male and female of their bodies, equally, as tenants in common, and their reſpective iſſue; and, for default of ſuch children and their iſſue, to the uſe of the heirs and aſſigns of the ſurvivor of the huſband and wife.

Lord *Camden* ſaid, "he was clear there could not "be croſs-remainders by implication in a deed; that "this was not the caſe of a ſettlement compleated, "but of articles executory. By the firſt part of the "articles, which conſidered the fund as money, no-"thing was to go over till the children were dead "without iſſue: this would aſſiſt him in conſtruing "the limitations of the land. As the ſurvivor of the "huſband and wife was to take nothing in the money, "till all the children were dead without iſſue, ſo, "they ſhould not take any intereſt in the reverſion of "the land, but in the ſame way."

His Lordſhip decreed, that there were croſs-remainders.

§ 60. By articles of agreement, made between *Charles* Duke of *Richmond* and *William* Earl of *Cadogan*, previouſly to the marriage of Lord *March* the Duke of *Richmond*'s eldeſt ſon with Lord *Cadogan*'s daughter, Lord *Cadogan* covenanted to lay out 60,000 *l.* in the purchaſe of lands, to be ſettled on Lord *March* and his intended wife for life, remainder to the children

Duke of Richmond's Caſe, Coll. Jur. Vol. 2. 347.

of the marriage, as the father and mother ſhould appoint, and, for want of appointment, to all the children, (the eldeſt excepted), equally to be divided between them, ſhare and ſhare alike, as tenants in common, and not as joint-tenants, and to the ſeveral and reſpective heirs of their reſpective bodies iſſuing; and, for want of ſuch iſſue, to the uſe and behoof of ſuch eldeſt ſon in tail, remainder over.

Lord *March*, who was afterwards Duke of *Richmond*, had iſſue by this marriage an eldeſt ſon, and ſix younger children; but no appointment was made.

By a private act of parliament, the lands, purchaſed with the 60,000 *l.*, were veſted in the eldeſt ſon, upon his engaging to pay the portions of the younger children; and, in this act, it was recited, that the younger children were entitled to the lands under the marriage articles, as tenants in common in tail, with croſs-remainders of their reſpective ſhares.

One of the younger children died under the age of 21 years; and the queſtion was, whether the portion of the child ſo dying became veſted in the ſurviving younger children, or went to the eldeſt ſon.

Lord Chancellor *Apſley* decreed, that the words of the articles imported, that croſs-remainders ſhould be limited to the younger children; it being perfectly plain, that the eldeſt ſon was never intended to take any ſhare of the 60,000 *l.*, ſo long as there remained a younger child in being to take: for, if there had been

been one younger child only, that child muſt have taken the whole.

§ 61. With reſpect to the words which are neceſſary to create a condition, Lord *Coke* ſays, the proper ones are *ſub conditione*, upon condition; but there are ſeveral other words and modes of expreſſion that will create a condition, if it appears to have been the intention of the parties to give them that effect. What Words create a Condition. 1 Inſt. 202 *b.*

§ 62. The word proviſo, provided always, &c. will alſo create a condition; but where it is uſed to make an eſtate conditional, three things are to be obſerved; 1ſt, That the proviſo do not depend on another ſentence, nor participate thereof, but ſtand originally of itſelf. 2d, That the proviſo be the words of the bargainor, feoffor, donor, &c. 3d, That it be compulſory to enforce the bargainee, feoffee, donee, &c. to do an act. 2 Rep. 70 *b.*

§ 63. Lord *Coke* ſays, if a man by indenture lets lands for years, provided always and it is covenanted and agreed between the ſaid parties, that the leſſee ſhall not alien. It was adjudged, that this was a condition by force of the proviſo, and a covenant by force of the other words. 1 Inſt. 203 *a.*

§ 64. Where a leaſe was made by indenture with this clauſe, and it is covenanted between the parties, or, it is agreed between the parties, that the leſſee ſhall not do a particular thing upon pain of forfeiture of the eſtate. This was adjudged to be a good condition. 1 Roll. Ab. 407.

Whichcock v. Fox, 1 Roll. Ab. 408.

§ 65. So, where a leſſee covenanted and granted with the leſſor, that he would not grant, aſſign, or ſell the land to any perſon, upon pain of forfeiture of the term, this was deemed to be a good condition.

Idem.

§ 66. But a proviſo added in the end of a covenant, extends only to defeat the ſame covenant; unleſs there are words *quod tunc*, the grant ſhall be void.

Hamington v. Pepul, Id.

§ 67. A leaſe was made of a farm, except the wood, and the leſſor covenanted, that the leſſee ſhould take all manner of underwood; provided always and the leſſee covenants that he will not cut any manner of timber trees. This is no condition, being but a declaration of what wood he was to meddle with.

Dyer 6 *a.*

§ 68. A leſſee for years covenanted, that if he, his executors, or aſſigns, ſold the term, that then the leſſor might re-enter. This was held not to be a condition, for all conditions ought to be reſerved and made on the part of the leſſor, donor, *&c.*

Molington v. Philpot, Dal. 86.

§ 69. But where *A.* made a leaſe to *B.*, wherein it was covenanted between the ſaid parties, that if it happened the ſaid rent was behind for ſix weeks, then it ſhould be lawful for *A.* to re-enter. *Dyer* held, that theſe words made a condition, becauſe they were the words of the leſſor, as well as of the leſſee.

Tit. 13. ch. 1. f. 10

§ 70. It has been already ſtated, that no preciſe technical words are required to make a condition precedent or ſubſequent, as the conſtruction muſt always be founded on the intention of the parties.

§ 71. There

§ 71. There are many cases in which clauses that appear to create a condition operate as limitations.

Thus, Lord *Coke* says, if a man makes a lease *quousque*, that is, until *J. S.* come from *Rome*, this is a limitation, and not a condition. 1 Inst. 214 *b.*

So, if a man makes a lease to a woman *quamdiu casta vixerit*, or if a man makes a lease for life to a widow, *si tamdiu in pura viduitate viveret*, or if a man makes a lease for 100 years, if the lessee live so long, these are limitations, and not conditions. Id.

TITLE XXXII.

DEED.

CHAP. XXV.

The ſame Subject continued.—Of the Rule in Shelley's Caſe.

§ 1. *Origin of the Rule.*
5. *The Rule ſtated.*
11. *Mode in which mediate Limitations are veſted.*
14. *Of Joint and ſeveral Limitations.*
22. *Both the Eſtates muſt be created by the ſame Inſtrument.*
28. *It is the ſame, where the Anceſtor takes by Implication.*
§ 30. *The Rule not extended to the Word Son, &c.*
31. *Nor to the Word Heir in the Singular Number.*
33. *Nor where the Eſtates are of different Natures.*
35. *Nor to Caſes of Marriage Articles.*
47. *The Rule adopted in Aſſignments of Terms for Years.*
50. *Unleſs there are ſuperadded Words.*

Section 1.

Origin of the Rule.

WHERE an eſtate was conveyed to *A.* for life, remainder to the heirs, or heirs of the body of *A.*, if the conſtruction had been made according to the ſtrict meaning of the words, and the plain intention of the grantor, *A.* would have taken only an eſtate for life, and the remainder to the heirs, or heirs of the body of *A.*, would have been conſidered as words of purchaſe, giving a contingent remainder to the heirs, or heirs of the body of *A.*, according to the rule of law, that *nemo eſt hæres viventis;* but it was found, that this conſtruction would be attended with ſeveral inconveniencies, and productive of great injuſtice.

§ 2. For,

§ 2. For, firſt, the lord of the fee would be defrauded of the wardſhip and marriage of the heir, becauſe, in that caſe, the heir would take as a purchaſer, without claiming any thing from his anceſtor, by hereditary ſucceſſion.

§ 3. Secondly, The remainder to the heirs, or heirs of the body being contingent until the death of the tenant for life, the inheritance was in ſuſpenſion or abeyance. And, it has been already obſerved, that this was never allowed but in caſes of abſolute neceſſity; becauſe the abeyance of the inheritance created a ſuſpenſion of various operations of law, particularly of the remedies for the recovery of lands by real actions. Tit. 1. f. 56. Blackſt. Arg. Harg. Tracts, 498.

§ 4. Thirdly, If the remainder, in thoſe caſes, was conſtrued to be contingent, no alienation could take place in the lifetime of the anceſtor. Idem 510.

§ 5. To remedy theſe inconveniencies, it appears to have been very early eſtabliſhed as a rule of law, that, "when the anceſtor, by any gift or conveyance takes "an eſtate of freehold, and, in the ſame gift or con-"veyance, an eſtate is limited either mediately or "immediately to his heirs, in fee or in tail, that al-"ways, in ſuch caſes, (the heirs), are words of limi-"tation of the eſtate, and not words of purchaſe." From which, it follows, that ſuch remainder is immediately executed in poſſeſſion, in the anceſtor ſo taking the freehold, and is not contingent or in abeyance. The Rule ſtated. 1 Rep. 104 *a*.

§ 6. The firſt caſe, according to Sir *William Black-*
ſtone, wherein this principle was eſtabliſhed, is thus
tranſlated by him from the *Year Book* of *Edw.* 2.

John Abel having two ſons, *Walter* and *John*, purchaſed the manor of *Fortyſgray* in *Kent*, to hold to himſelf and *Matilda* his wife, and *Walter Abel* his eldeſt ſon, and to the heirs of the body of *Walter* begotten, and if *Walter* died without heir of his body, the manor ſhould remain to the right heirs of *John* the father. *Matilda* the wife died, and *Walter* the ſon alſo died without heirs of his body. *John* the father became bound in a ſtatute merchant, to pay 100 *l.* to *B.* at a day certain, and died, leaving his younger ſon *John* his heir. After the day of payment was elapſed, the creditor ſued out a writ to the ſheriff of *Kent*, to extend and deliver to him all the lands which *John Abel* the father had on the day of acknowledging the ſtatute. The ſheriff returns, that he had delivered to other creditors upon recognizances, all the lands which *John Abel* had in fee, except the manor of *Fortyſgray*, in which he had only an eſtate for term of life. Upon this return it was argued, that *John* the father had only the freehold for term of life, the fee ſimple being limited to his heirs, who therefore took by purchaſe, and not by deſcent; but the court held the contrary, for which this reaſon (among others) is given by *Stonor*, J. *viz.* Becauſe otherwiſe the fee and the right, after the death of *Walter* the eldeſt ſon, would have been in nobody. And therefore *Bereſford*, C. J. gave the rule, that execution ſhould be awarded upon this manor of *Fortyſgray*.

§ 7. The

§ 7. The caſe from which this rule took its name, and in which it was finally eſtabliſhed, was thus:

Edward Shelley being tenant in tail, ſuffered a recovery and declared the uſes to himſelf for life, without impeachment of waſte, remainder to a truſtee for twenty-four years, remainder to the heirs male of the body of the ſaid *Edward Shelley*, and the heirs male of ſuch heirs male, remainder over. It was adjudged upon great conſideration, that the words giving the remainder to the heirs male of the body of *Edward Shelley*, operated as words of limitation, and not as words of purchaſe, and therefore that *Edward Shelley* took an eſtate tail under the declaration of uſes. Shelley's Caſe, 1 Rep. 93.

§ 8. Serjeant *Roll* has attempted a diſtinction reſpecting this rule, by ſaying, that where the freehold is ſo limited to the anceſtor, and a mediate remainder to his right heirs, that all the intermediate eſtates between that and the limitation to his heirs, as well as his own eſtate, may determine during his life, in that caſe the limitation to his heirs is in abeyance, becauſe he can have no heir to take the remainder. But Mr. *Fearne* has controverted this diſtinction, and ſhewn that the poſſibility of the freehold's determining in the lifetime of the anceſtor who takes it, does not prevent the ſubſequent limitation to his heirs from attaching in himſelf. 2 Roll. Ab. 418. Cont. Rem. 32.

§ 9. When the anceſtor takes only an eſtate for years (another perſon being the grantor) a remainder 1 Inſt. 319 *b.*

to his heirs or to the heirs of his body will not veſt in himſelf, but in ſuch heirs, by purchaſe.

Sir C. Tippin's Caſe cited. 1 P. Wms. 359.

§ 10. Thus, where, upon a marriage, a ſettlement was made by a third perſon, to the uſe of the huſband for ninety-nine years, remainder to truſtees during the life of the huſband to ſupport contingent remainders, remainder to the wife for life, remainder to the firſt and other ſons of the marriage, remainder to the heirs of the body of the huſband, remainder to the right heirs of the huſband. It was admitted that the remainder in fee to the huſband was contingent, becauſe he only took the particular eſtate for years, and the eſtate did not move from him, for if it had, the remainder limited to his right heirs, would have been the old reverſion.

Ante ch. 23. ſ. 12.

Mode in which mediate Limitations are veſted.

§ 11. Where the ſubſequent limitation is immediate, it then becomes executed in the anceſtor, forming by its union with his particular freehold one eſtate of inheritance in poſſeſſion. But where ſuch limitation is mediate, it is then a remainder veſted in the anceſtor, who takes the freehold, not to be executed in poſſeſſion, until the determination of the preceding mean eſtates.

§ 12. Where the limitations intervening between the firſt eſtate for life, and the limitation to the heirs of the body are contingent, the eſtate for life is not merged, becauſe the intervening limitations would be thereby deſtroyed; but the two limitations are united and executed in the anceſtor only, until ſuch time as

the intervening limitations become veſted, and then they open and become ſeparate, in order to admit ſuch intervening limitations, when they ariſe.

§ 13. *Thomas Bowles*, in conſideration of a marriage, covenanted to ſtand ſeiſed to the uſe of himſelf and his wife *Ann*, for the term of their lives; and, after their deceaſes, "to the uſe of their firſt iſſue "male, and to the heirs male of ſuch iſſue lawfully "begotten, and ſo over to the ſecond, third, and "fourth iſſue male, &c. And for want of ſuch iſſue "to the heirs male of the body of the ſaid *Thomas* "and *Ann*."—It was reſolved, that, until iſſue, *Thomas Bowles* and *Ann* were ſeiſed of an eſtate tail executed *ſub modo*, that is, until the birth of iſſue male; and then, by operation of law, the eſtates were divided: and *Thomas* and *Ann* became tenants for their lives, remainder to the iſſue male in tail, remainder to the heirs of *Thomas*; as the eſtate, limited to them for their lives, was not merged. Bowles's Caſe, 11 Rep. 79. Vide Meredith v. Leſlie. Tit. 36.

§ 14. Mr. *Fearne* ſays, where there is a joint limitation of the freehold to ſeveral, followed by a joint limitation of the inheritance in fee ſimple to them, as an eſtate to *A.* and *B.* for their lives, or in tail, and afterwards to their heirs, ſo that both limitations are of the ſame quality, that is both joint, it ſeems the fee veſts in them jointly. And ſo if the limitation of the freehold be to baron and feme jointly, remainder to the heirs of their bodies, it is an eſtate tail executed in them; as they are capable of iſſue to whom ſuch joint inheritance can deſcend. Of joint and ſeveral Limitations.

§ 15. If

§ 15. If the limitation of the freehold be not joint but ſucceſſive, as to one for life, remainder to the other for life, remainder to the heirs of their bodies, there it ſeems the ultimate limitation is not executed in poſſeſſion, but gives them a joint remainder in tail.

Stephens v. Bretridge, T. Ray. 36.

§ 16. Sir *Francis Wortly*, in conſideration of an intended marriage with *Heſter*, covenanted to ſtand ſeiſed to the uſe of himſelf for life, remainder to *Heſter* for life, remainder to the heirs males which he ſhould beget upon the body of *Heſter*. It was reſolved, that the eſtate tail was not executed, becauſe there was an intervening remainder limited to the wife.

2 Term Rep. 435. 2 Blackſt. Rep. 731. Fearne Cont. Rem. 44.

§ 17. Where an eſtate for life is limited to *A.* with a remainder to heirs of *A.* and *B.* this is a contingent remainder, and not a veſted eſtate. So if there be a limitation to the wife for life, remainder to the heirs of the body of the huſband and wife, this is no remainder to the wife, for the freehold is limited to her alone, and as the perſon who is to take in remainder muſt be heir of both their bodies, if the wife ſhould die before the huſband, there can be no one to anſwer that deſcription when the particular eſtate determines, becauſe the huſband cannot have an heir during his life, nor could it be involved or flow into the limitation to the wife herſelf, as not being confined to her own heirs; therefore the remainder is in contingency.

§ 18. If

§ 18. If the limitation of the inheritance be to ſeveral men, or to ſeveral women in tail, inſtead of fee ſimple, though the freehold be to them jointly, they take ſeveral eſtates of inheritance, becauſe they cannot have iſſue between or among them as a man and a woman may. And the ſame rule extends to other caſes, where the relative ſituations of the grantees renders the poſſibility of iſſue between or among them more remote than what is termed a ſimple or common poſſibility, or elſe is inconſiſtent with the laws of marriage.

Fearne Cont. Rem. 41. Lit. ſ. 283. 1 Inſt. 182 *a*.

§ 19. Where the particular eſtate is granted to two perſons, with a limitation to the heirs or heirs of the body of one of them, the inheritance is executed in the perſon to whoſe heirs it is limited.

§ 20. In a modern caſe, lands were conveyed by leaſe and releaſe, in conſideration of marriage, to *John Watkins* for life, remainder to *Suſannah Stephens* his intended wife for life, for her jointure, remainder to the uſe of the heirs of the body of the ſaid *Suſannah* by him the ſaid *John Watkins* to be begotten, and of their heirs and aſſigns for ever. It was held that *Suſannah Stephens* took an eſtate tail.

Alpaſs v. Watkins, 8 Term R. 516.

§ 21. Mr. *Fearne* obſerves, that limitations of this kind are ſaid to be executed *ſub modo*, that is, to ſome purpoſes, though not to all; for though they are ſo far executed in, or blended with the poſſeſſion, as not to be grantable away from, or without the freehold by way of remainder, yet they are not ſo executed in poſſeſſion

poſſeſſion as to ſever the jointure, or entitle the wife of the perſon ſo taking the inheritance to dower.

Both the Eſtates muſt be created by the ſame Inſtrument.

§ 22. The rule eſtabliſhed in *Shelley's* caſe does not take place, unleſs the particular eſtate, and the remainder to the heir or heirs of the body, are created by the ſame conveyance: for, by the very words of the rule, as ſtated in *Shelley's* caſe, both eſtates muſt be created in the *ſame gift or conveyance.*

Cranmer's Caſe, 2 Leon. 5. 7.

§ 23. It was determined ſo long ago as 16 *Eliz.*, that if a leaſe was made to *A.* for life; remainder to the right heirs of *B.*, and *B.* purchaſed the eſtate of *A.* the remainder would not thereby become executed: for it was not conveyed by the original grant, but by the act of another perſon, after the original grant.

Moor v. Parker, 1 Ld. Raym. 37.

§ 24. *A.*, on the marriage of *B.* his ſon, ſettled lands to the uſe of *B.* for life, remainder to the wife of *B.* for life, remainder to their firſt and other ſons in tail, with reverſion to himſelf in fee.

Afterwards *A.* deviſed the ſame lands to ſuch iſſue male as *B.* ſhould have by any other wife in tail male, and, in caſe of failure of iſſue male in *B.*, to his grandchildren by his daughter *C.* in fee. *B.* ſuffered a recovery, and died without iſſue male. *Holt*, Chief Juſtice, held clearly, that the deviſe to *B.'s* iſſue male, by any other wife, could not be tacked to the eſtate for life; becauſe that was limited by another conveyance.

§ 25. Lord

§ 25. Lord Keeper *Wright* is reported to have ſaid reſpecting this point, that, "all the authorities are "only in the affirmative; that if by the ſame deed "they ſhall conſolidate; not negatively, that if by "different deeds, they ſhall not." But there was no decree in that caſe; and this doctrine is now fully ſettled, by the following determination of the Court of King's Bench: 2 Vern. 486.

§ 26. *Claude Fonnereau*, by indenture made between him and his eldeſt ſon *Thomas*, in conſideration of natural love and affection, granted the eſtate to the ſaid *Thomas* for life. Afterwards the father deviſed the reverſion to the heirs male of the body of *Thomas*. It was contended, that the rule in *Shelley*'s caſe applied only, where both the limitations were in the ſame inſtrument; that the court now (when the feudal reaſons, for which it was introduced, had ceaſed) would not be inclined to extend the rule, as it tended in moſt inſtances rather to defeat, than to give effect to, the real intention of the teſtator. Doe v. Fonnereau, Doug. 487.

Lord *Mansfield* ſaid, the court was unanimous in thinking, that the eſtate for life being by one inſtrument, and the limitation in tail by another, they could not unite, Id. 510.

§ 27. By a ſettlement made after marriage, and a fine, lands were limited to *S. Morris* for life, remainder to *Hannah Morris* for life, remainder to the firſt and other ſons of the marriage in tail, remainder to the firſt and other daughters in tail, remainder to *Hannah* Venables v. Morris, 7 Term Rep. 342.

Hannah Morris in tail, remainder to the uſe of ſuch perſon or perſons as *Hannah Morris* ſhould by deed appoint. *Hannah Morris* appointed the eſtate to the uſe of the right heirs of *S. Morris* for ever.

Upon this caſe, ſent out of Chancery for the opinion of the Court of King's Bench, it was certified that the appointment made by *H. Morris*, did not create any eſtate which could unite with the life eſtate of *S. Morris*.

Vide Fearne Cont. Rem. 99.

It is the ſame where the Anceſtor takes by Implication.

§ 28. It is immaterial, with reſpect to this rule, whether the anceſtor takes the freehold by an expreſs limitation, or by an implication ariſing from the deed in which the eſtate is limited to his heirs, or the heirs of his body. In either caſe the rule is applied and the ſubſequent limitation veſts in himſelf.

Tit. 11. ch. 4. f. 29.

§ 29. Thus, in the caſe of *Pybus* v. *Mitford*, it was determined, that the covenantor took an eſtate for his own life, by implication, and that the ſubſequent limitation to his heirs male was executed in him, and united to the eſtate for life, which he took by implication, ſo that he became tenant in tail.

The Rule not extended to the Words Son, &c.

§ 30. As one of the principal reaſons for eſtabliſhing this rule was, to prevent an abeyance or ſuſpenſion of the inheritance, it is only applied to limitations in which the word heirs is uſed, on account of the peculiar ſignification which the law has annexed to that word, and the maxim that *nemo eſt hæres viventis*; ſo that if lands are limited to *A.* for life, remainder to his

his firſt and other ſons and the heirs of their bodies; or remainder to the child and children of *A.*, or to the iſſue of *A.* and the heirs of their bodies, no more than an eſtate for life will veſt in *A.*, and the words ſon, child, or iſſue, will operate as words of purchaſe.

Bowles's Caſe, ante f. Waker v. Snow, infra.

§ 31. The word heir, in the ſingular number, with words of limitation ſuperadded, is a word of purchaſe in a deed, for it operates as a deſcription of the perſon intended to take.

Nor to the Word Heir in the ſingular Number.

§ 32. *A.* conveyed lands by fine to the uſe of himſelf for life, remainder to the uſe of his firſt ſon and the heirs male of his body, with ſimilar limitations to his 2d, 3d, 4th, 5th, and 6th ſons, with remainder to the right heir male of the ſaid *A.* to be begotten after the ſaid ſixth ſon and of his heirs male. It was held to be a contingent remainder.

Waker v. Snow, Palm. 359.

§ 33. Where the particular eſtate and the remainder to the heirs, or heirs of the body of the perſon to whom the particular eſtate is limited, are of different natures, as if the firſt limitation only gives a truſt eſtate of freehold, and the ſubſequent limitation to the heirs of the body carries the legal eſtate, the words, heirs of the body, will operate as words of purchaſe, and will paſs a contingent remainder to ſuch heirs.

Nor where the Eſtates are of different Natures.

§ 34. Thus, in the caſe of Lord *Say* and *Sele* v. *Jones*, where a truſt eſtate was deviſed to a woman for life, and a legal remainder to the heirs of her body, it

Tit. 12. ch. 1. f. 22. 3 Bro. Parl. Ca. 113.

was held, that the heirs of her body muſt take by purchaſe, there being no inſtance where the legal limitation of an eſtate to the heirs of the body of any perſon had been united to a prior equitable limitation of the ſurplus profits of ſuch eſtate to the ſame perſon for life, ſo as to make ſuch perſon tenant in tail by conſtruction of law.

Nor to Caſes of Marriage Articles.

§ 35. This rule is not adopted in the conſtruction of articles entered into before marriage for the purpoſe of making a ſettlement. For, in ſuch caſes, the Court of Chancery conſiders, that marriage articles are, in their nature, executory, and ought to be conſtrued according to the intention of the parties; that a proviſion for the iſſue of the marriage, is one of the great and immediate objects of ſuch agreement; and, conſequently, that the intention of the parties, however untechnically expreſſed, muſt be, to make ſuch a ſettlement as ſhall contain an effectual proviſion for that iſſue, who are purchaſers for a valuable conſideration; and whoſe rights it is the duty of a court of equity to protect: ſo that, where in marriage articles it is agreed to ſettle lands, to the uſe of the huſband for life, with remainder to the heirs of his body, theſe laſt words are conſtrued to be words of purchaſe, and to mean the firſt and other ſons of the marriage, and the heirs of their bodies.

1 Brown's Rep. 222.

Trevor v. Trevor, 1 P. W. 662. 1 Ab. Eq. 387. Vide Cuſack v. Cuſack, 1 Bro. Parl. Ca. 470.

§ 36. Sir *John Trevor*, in conſideration of an intended marriage, covenanted with truſtees, before the end of two years, to ſettle and aſſure upon the ſaid truſtees and their heirs, certain lands, to the uſe of himſelf

ſelf for life, without impeachment of waſte; remainder to the uſe of his intended wife for life; remainder to the uſe of the heirs males of his body on her body lawfully to be begotten, and the heirs males of ſuch heirs males lawfully iſſuing; remainder to the uſe of his own right heirs. The marriage took effect; but no ſettlement was ever made purſuant to theſe articles. Sir *John Trevor*, apprehending that he had an eſtate tail veſted in him under theſe articles, he and his wife levied a fine of the lands. Upon the death of Sir *John Trevor*, his eldeſt ſon filed his bill in Chancery for a ſpecific performance of theſe articles; inſiſting, that it was not in his father's power to bar the limitation to him.

It was decreed, that Sir *John Trevor* took only an eſtate for life under theſe articles; and that the remainder to the heirs males of his body, *&c.* gave an eſtate tail by purchaſe to the firſt and other ſons of the marriage. And this decree was affirmed in the Houſe of Lords.

§ 37. Where a ſettlement was made previous to a marriage, in purſuance of articles, and the ſettlement, by adopting the very words of the articles in limiting an eſtate for life to the huſband, with a ſubſequent limitation to the heirs of his body, *&c.* had given him an eſtate tail, the Court of Chancery rectified the miſtake, by making the intended huſband only tenant for life, with contingent remainders to the iſſue of the marriage.

West v. Erisley. 2 P. W. 349. 3 Bro. Parl. Ca. 327. Collect. Jur. v. 1. 463. Honor v. Honor, 1 P. W. 123. S. P.

§ 38. By articles, in consideration of an intended marriage, it was agreed, that the husband should settle his estate to the use of himself for life, without impeachment of waste; remainder to the intended wife for life, remainder to the heirs male of the husband by the said intended wife; remainder to the heirs male of the husband by any other wife; remainder to the heirs female of the husband.

A settlement was made prior to the marriage, expressed to be made *in pursuance and performance of the articles*, by which the lands were limited to the intended husband for life; remainder to the wife for life for her jointure; remainder to the first and other sons of the marriage in tail male; remainder to the heirs of the body of the said husband by his then intended wife; remainder over.

The marriage took effect; and there was issue one daughter. The wife died: and the husband, having an estate tail under the limitation to the heirs of his body, suffered a recovery, and sold the estate. The daughter left issue two daughters; who, after the death of the husband, brought their bill to have the benefit of the articles, insisting, that the estate was intended to have been limited in strict settlement; so that the last remainder ought to have been to the daughters of the marriage in tail general.

The bill was dismissed: but, upon an appeal to the House of Lords, this decree was reversed; and the lands, comprized in the articles, were directed to be conveyed to the granddaughters, and the heirs female of

of their bodies, as tenants in common, with croſs-remainders to them in tail female.

§ 39. In this laſt caſe, the equity aroſe to the iſſue female, in whoſe favour the court declared, that the ſettlement ſhould be altered. But, in a ſubſequent caſe, where there was an expreſs proviſion made for daughters, a limitation to the heirs of the huſband generally was not conſtrued as equivalent to a remainder to daughters. But it is now ſettled, that the ſame equity ariſes in favour of females as males.

Powell v. Price, 2 P. W. 536.

Hart v. Middlehurſt, 3 Atk. 371.

§ 40. The general doctrine, that, where articles and a ſettlement are made before marriage, and the ſettlement is made in purſuance of the articles, if the words "*heirs of the body*" are tranſcribed from the articles into the ſettlement, they will be altered in Chancery, is fully confirmed by the following caſe:

§ 41. By articles before marriage, an eſtate was agreed to be ſettled on the huſband for life, *ſans* waſte, remainder to the heirs male of his body, with power to raiſe portions for younger children.

Roberts v. Kingſley, 1 Veſ. 238.

A ſettlement was afterwards made before the marriage, in purſuance of the articles, which adopted the very words of the articles. After the marriage, the huſband levied a fine of the eſtate, and declared the uſes to himſelf in fee. The ſon of the marriage brought his bill to have the ſettlement rectified according to the intention of the articles, which was to make his father tenant for life only; though the words, both of the articles and ſettlement, in conſtruction of law, made

him tenant in tail: for, if such was the intent, it was needless to give him a power to raise portions.

Lord *Hardwicke* decreed the lands should be conveyed to the son in tail.

§ 42. If the settlement is made after the marriage, and adopts the words of the articles, it will be rectified in the same manner as in the former cases.

Streatfield v. Streatfield, Forrest. Rep. 176.

§ 43. A person, by articles previous to his marriage, agreed to settle lands, to the use of himself and his intended wife for their lives, and the life of the survivor; and, after the survivor's decease, to the use of the heirs of the body of the intended husband on his wife begotten, with remainders over. The marriage took effect; and, several years after, the husband, by deed reciting the articles, settled certain lands to the use of himself and his wife for their lives, and the life of the longest liver of them; and, after their decease, to the use of the heirs of the body of the husband by his said wife, remainder to the right heirs of the husband.

It was decreed by Lord *Talbot*, that the husband ought only to be tenant for life, and the settlement must be rectified in that respect.

§ 44. This doctrine is adopted only in cases of marriage articles, and is not extended to limitations, in settlements of the legal estate.

§ 45. *John*

§ 45. *John Watkins*, by ſettlement on the marriage of his eldeſt ſon, conveyed his eſtate to truſtees to the uſe of himſelf for life, remainder to his wife for life; remainder to his ſon *John* for life; remainder to his intended wife for life, for her jointure; remainder to the heirs of the body of the ſaid intended wife by the ſaid *John* the ſon to be begotten, and their heirs and aſſigns for ever; remainder to the right heirs of *John* the ſon for ever. Alpaſs v. Watkins, 8 Term R. 516.

It was contended, that, as it appeared by a recital in the ſettlement, that it was made "for the ſettling, "conveying, and aſſuring of the ſaid premiſes to the "ſeveral uſes therein-after expreſſed," a court of equity would rectify the ſettlement, by inſerting a limitation to the firſt and other ſons of the marriage, in the room of the limitation to the heirs of the body of the intended wife. But Lord *Kenyon* was clearly of opinion, that the wife took an eſtate tail under the ſettlement.

§ 46. Although, where articles are entered into before marriage, and a ſettlement is made after marriage, different from thoſe articles, the court will ſet up thoſe articles againſt the ſettlement; yet, when both the articles and the ſettlement are previous to the marriage, at a time when all the parties are at liberty, and the ſettlement is not expreſſed to be made purſuant to the articles, if ſuch ſettlement differ from the articles, it will be conſidered as founded on a new agreement, and will control the articles. Legg v. Goldwire. Caſes Temp. Talbot. 20.

The Rule adopted in Aſſignments of Terms for Years.

§ 47. The rule, in *Shelley*'s caſe, has been adopted in the conſtruction of aſſignments of terms for years; and the words, heirs of the body, have been held to be words of limitation.

Peacock v. Spooner, 2 Vern. 43. 195. 1 P. W. 133.

§ 48. A term for years was aſſigned in truſt that baron and feme might receive the profits during their lives, and the life of the longer liver of them, and, after their death, to the heirs of the body of the wife to be begotten by the huſband; the court held, that the whole intereſt of the term veſted in the wife. But this decree was reverſed, and the reverſal affirmed by the Houſe of Lords; but the doctrine eſtabliſhed by this reverſal was ſoon altered.

Webb v. Webb, 1 P. W. 132.

§ 49. A term of years was aſſigned, in conſideration of marriage, to truſtees, upon truſt to permit the huſband to enjoy the ſame as long as he ſhould live, and, after his deceaſe, to his wife, as long as ſhe ſhould live; and after their deceaſe, to permit the heirs of the bodies of the ſaid huſband and wife to be begotten, to hold the premiſes during the remainder of the term; it was held by the Maſter of the Rolls, that the children of the marriage took by purchaſe. But, upon a rehearing before Lord Keeper *Harcourt*, his Lordſhip obſerved, he never heard it ſaid before the caſe of *Peacock* v. *Spooner*, that the limitation of a term in equity differed from the caſe of a freehold at common law; and, as that caſe was not exactly parallel, he did not think himſelf tied up by it, and reverſed the decree made at the rolls.

Haytor v. Rod, Tit. 8. ch. 2. ſ. 20. 2 Veſ. R. 660.

A term

§ 50. A term was veſted in truſtees by a voluntary deed, in truſt to pay the profits to *Sarah Sharp* during her life, and, immediately from and after her deceaſe, to the heirs of the body of *Sarah* lawfully to be begotten, if the term ſhould ſo long endure; and, for default of ſuch iſſue, to the granddaughter of the ſettlor. Theebridge v. Kilburne, 2 Veſ. 233.

Lord *Hardwicke* was of opinion, that the whole truſt of the term veſted in *Sarah Sharp*.

§ 51. But where there were words of limitation ſuperadded to the words heirs of the body, the conſtruction has been different. Unleſs there are ſuperadded Words.

§ 52. *Edward Buſſey* being poſſeſſed of a term for fifty-nine years, by voluntary deed conveyed it to truſtees in truſt, to permit *Grace Buſſey* his wife to receive the rents and profits for the ſaid term of fifty-nine years, if ſhe ſhould ſo long live, and after her deceaſe to the uſe of the ſaid *Edward* for life, and after the deceaſe of *Edward* and *Grace*, then in truſt for the heirs of the body of the ſaid *Grace* by the ſaid *Edward*, and to their executors, adminiſtrators, and aſſigns, for the reſidue of the ſaid term of fifty-nine years, and for want of ſuch iſſue, *&c.* Hodſol v. Buſſey, Forreſt MSS. S. C. 2 Atk. 89. Barnard. 199.

Lord *Hardwicke* was of opinion that the whole did not veſt in *Grace*, the words being, not words of limitation but of purchaſe; and that they might, from the circumſtances of the caſe, be conſidered as words of purchaſe, appeared from *Archer's* caſe, where the ſuperadding 1 Rep. 66.

ſuperadding words of limitation made the word "heir" a word of purchaſe.

Price v. Price, 2 Veſ. 234.

§ 53. Where a perſon on his marriage ſettled a leaſehold eſtate to truſtees, to the ſole and ſeparate uſe of his intended wife for life, for her jointure, and from and after her deceaſe, to the uſe of the heirs of the body of the wife, by the huſband to be begotten, and for want of ſuch iſſue, to the uſe of the huſband and his heirs for ever. Sir *Joſeph Jekyll* held, that on the wife's death, the leaſehold veſted in the heirs of her body, as purchaſers.

Sands v. Dixwell, 2 Veſ. 652.

TITLE

TITLE XXXII.

DEED.

CHAP. XXVI.

The ſame Subject continued.—Of Perpetuities.

§ 1. *Perpetuities diſcouraged.*
7. *Hiſtory of Settlements.*
11. *Eſtates may be rendered unalienable for Lives in being and 21 Years after.*
13. *This Rule is applied to ſpringing and ſhifting Uſes.*
16. *And alſo to Uſes ariſing from Appointments.*
18. *But not to Remainders after Eſtates Tail.*
21. *An unborn Perſon may be made Tenant for Life.*
23. *And a veſted Remainder limited on that Eſtate*
24. *But no Eſtate can be limited to the Iſſue of an unborn Perſon.*
27. *Theſe Rules applicable to Declarations of Truſts of Terms for Years.*
29. *Perpetuities created by Act of Parliament.*

Section 1.

Perpetuities diſcouraged. Ante ch. 1.

WE have ſeen that by the introduction of the feudal law into *England*, all real property was rendered unalienable, and that by degrees the proprietors of land acquired a power of alienation. And this power was found to be ſo beneficial to the country, that the Judges have for many centuries eſtabliſhed it as a rule, that real property ſhould in no caſe be rendered unalienable, or as they uſually expreſſed it, that perpetuities ſhould not be allowed. And this rule being founded on principles of general policy, is adopted by courts of equity in as full an extent, as by courts of law.

3 Cha. Ca. 31; 1 Vern. 164.

§ 2. Thus,

Tit. 1. f. 60.

§ 2. Thus, it has been ſtated, that an **unlimited** power of alienation is an incident ſo **inſeparably** annexed to an eſtate in fee ſimple, that **it cannot** be reſtrained by any proviſo or condition **whatever.**

Dyer 23 *a.* pl. 12. 3 Cha. Ca. 19.

§ 3. It was determined in the reign of *Henry* 8. for the ſame reaſon, that no remainder could be limited over after a previous diſpoſition of the fee ſimple: for if ſuch remainder was allowed, the eſtate in fee would become unalienable.

Tit. 2. ch. 1.

§ 4. The ſtatute *De Donis Conditionalibus*, was procured by the nobility, for the purpoſe of rendering their poſſeſſions unalienable. But the Judges, by means of thoſe fictitious proceedings, called fines and recoveries, of which an account will be given hereafter, effectually defeated the operation of this ſtatute, and alſo laid it down as a rule, that a tenant in tail cannot be reſtrained from barring his eſtate in this manner, by any proviſo or condition whatever.

Tit. 2. ch. 2. f. 44. Vide Tit. 35, 36.

§ 5. Any other mode of reſtraining a tenant in tail from alienation, will alſo be deemed void, as tending to a perpetuity.

Mainwaring v. Baxter, 5 Veſ. Jun. 458.

§ 6. Lands were limited by deed to *A.* for ninety-nine years, if he ſhould ſo long live, remainder to truſtees to preſerve contingent remainders, remainder to truſtees for a term of one thouſand years, remainder to the firſt and other ſons of *A.* in tail male.

With

With a proviſo that the truſtees ſhould, after any contract or agreement made by any of the perſons taking eſtates under the deed touching the alienation of the premiſes, but before any alienation ſhould be made, or any act done which might prevent the premiſes from going according to the limitations aforeſaid, by ſale or mortgage, raiſe 5000 *l.* and pay the ſame to the perſons who would be entitled to the premiſes, in caſe the perſon contracting to alien were actually dead.

The Maſter of the Rolls ſaid, it was a mere device to prevent alienation, and therefore he declared that the truſts of the term, as tending to a perpetuity, and being inconſiſtent with the rights of the ſeveral perſons to whom eſtates tail were limited by the deed, were void, and of no effect.

§ 7. Mr. *Butler* has obſerved, that the firſt attempt at a ſettlement was, the creation of an eſtate in fee ſimple conditional. This had two effects, that of ſuſpending the abſolute power of alienation, till the birth of iſſue, and that of preſerving the inheritance in a particular line of ſucceſſion. When theſe eſtates were converted into eſtates tail by the ſtatute *De Donis*, a ſimple intail of the land was ſufficient to preſerve it in the family of the ſettlor. Upon the introduction of fines and recoveries, ſettlements of this kind were found to be ineffectual. But when huſbands ſeiſed in right of their wives, and women, ſeiſed of the gift of their huſbands, were prohibited from alienating thoſe eſtates, it became uſual to limit the huſband's eſtate

Hiſtory of Settlements. 1 Inſt. 290 *b.* *a.* 1. ſ. 3.

Vide Tit. 36.

eſtate to the huſband and wife, and the heirs of the body of the wife, by the huſband, and to limit the wife's eſtate to the huſband and wife, and the heirs of the huſband by the wife; by which means the eſtate was ſecured to the parents during their lives, and to the iſſue, againſt the act of either parent. Nothing but the concurrent act of both parties could deprive the iſſue of the eſtate. It was protected againſt the caprice or extravagance of one of the parties, ſo long as the other refuſed to co-operate in unfettering the intail, while there was a proviſion for unforeſeen events, by their co-operation during their joint lives. And during the life of the ſurviving parent, the ſame effects might be produced, by the co-operation of that parent and the iſſue; and after the deceaſe of both parents, the eſtate was reſtored to the iſſue with a complete power of alienation.

§ 8. The laſt mode of making ſettlements, and which ſtill continues to be practiſed, was to limit the eſtate to the intended huſband for life, remainder to the intended wife for life, remainder to the firſt and other ſons of the marriage, ſucceſſively in tail; by which means the eſtate was rendered unalienable until the eldeſt ſon of the marriage attained the age of twenty-one years, when he could join with his father or mother in ſuffering a common recovery, by which the eſtate tail limited to ſuch eldeſt ſon, and all the ſubſequent eſtates, were barred; and a new fee ſimple acquired.

§ 9. There

§ 9. There was one inconvenience attending limitations of this kind, namely, that the tenant for life might bar and deſtroy the remainders limited to his firſt and other ſons by the alienation or forfeiture of his eſtate; but the invention of truſtees to preſerve contingent remainders, of which an account has been already given, proved an effectual remedy to this abuſe.

Tit. 16. ch. 7. ſ. 1. 2. 24.

§ 10. Another mode of protracting the power of alienation was invented long after, by limiting the eſtate to the father for ninety-nine years, if he ſhould ſo long live, and veſting the freehold in truſtees during his life, upon which there was a limitation to the firſt and other ſons (then unborn) of the father, ſucceſſively in tail; by which means the power of barring the intail was in general protracted, until the death of the father.

Tit. 16. ch. 7. ſ. 20. 3 Atk. 136.

§ 11. In conſequence of the general admiſſion of theſe modes of ſettling eſtates, it became fully eſtabliſhed that real property might be rendered unalienable during a life in being and twenty-one years after. From one life the courts gradually proceeded to ſeveral lives in being at the ſame time, for this in fact only amounts to the life of the ſurvivor; and as it may happen that a tenant for life, to whoſe unborn ſon an eſtate tail is limited, may die leaving his wife enſient, an allowance has alſo been made for the time of geſtation of a poſthumous child.

Eſtates may be rendered unalienable for Lives in being and 21 Years after.

3 P. Wms. 265.

§ 12. It

§ 12. It may, therefore, be now laid down as a certain rule of law, that an eſtate may be rendered unalienable during the exiſtence of a life, or any number of lives in being, and nine months, and twenty-one years after; but all reſtraints on alienation which exceed this period, are void. And, in the caſe of deeds, the limitations are alſo void.

Forreſt. R. 228. Vide Lade v. Helford, Tit. 38.

§ 13. We have ſeen, that in thoſe conveyances which derive their effect from the ſtatute of uſes, ſpringing and ſhifting uſes might be created to ariſe upon or after a limitation in fee-ſimple, and, it having been determined, that neither a fine or recovery, or any other act of the firſt taker, ſhould defeat ſuch ſpringing or ſhifting uſe, it became therefore neceſſary to aſcertain the time when ſuch uſe ſhould become veſted; for, otherwiſe, ſpringing and ſhifting uſes might be limited on ſuch remote contingencies, as to create perpetuities. It is, therefore, now fully eſtabliſhed, that if an eſtate in fee-ſimple is firſt limited, the event on which the ſpringing or ſhifting uſe is to ariſe muſt be ſuch, that it muſt either take place, or become incapable of taking place, during the exiſtence of one or more life or lives in being, and nine months and twenty-one years after.

This Rule is applied to ſpringing and ſhifting Uſes. Tit. 16. ch. 5. ſ. 17, &c. Lloyd v. Carew, Show. Parl. Ca. 137. 1 Com. R. 20.

§ 14. Thus, if there be a limitation of a uſe to *A.* and his heirs, with a proviſo, limiting the eſtate to *B.*, if *A.* dies without iſſue living at the time of his death, or if *A.* and *B.* both die without iſſue living at the deceaſe of the ſurvivor of them, or, if *A.* has no child who attains the age of 21, or if neither *A.* nor *B.* have a child who attains the age of 21, it is a good proviſo;

viſo; for theſe events are ſuch, that they muſt happen, or become incapable of happening within the period above mentioned. But, for the ſame reaſon, ſuch a proviſo would be bad, if limited to take effect after an indefinite failure of iſſue of *C.* a ſtranger, as that event might not happen till long after that period.

§ 15. Where huſband and wife levied a fine of the wife's eſtate to the uſe of the heirs of the body of the huſband on the wife begotten, remainder to the huſband in fee, the limitation to the heirs of the body of the huſband was held to be void as a contingent remainder, for want of a preceding eſtate of freehold to ſupport it. And Mr. *Fearne* obſerves, there was no ſort of ground to maintain the validity of the limitation to the right heirs of the huſband, as a future uſe, as it was poſtponed to a general failure of heirs of the body of the huſband, by the wife, which was too remote.

Davies v. Speed, Show. Parl. Ca. 104.

Cont. Rem. 429.

Holcraft's Caſe, Moo. 488. Fearne Ex. Dev. 111.

§ 16. With reſpect to contingent uſes ariſing from the act of the parties, that is, by the execution of powers of revocation and appointment, it has been obſerved, that an appointment operates under the ſtatute of uſes, not as a conveyance of the land, but as a ſubſtitution of a new uſe in the place of a former one, and a deſignation of the perſon in whom the new uſe is to veſt; and the perſon taking under a power, derives his eſtate, not from the perſon executing the power, but under the original conveyance by which the power was created, in the ſame manner as if the uſe appointed had been originally limited to him in

And alſo to Uſes ariſing from Appointments.

Ante ch. 16.

ſuch conveyance; and that the uſe, when appointe by the perſon executing the power, is fed by the ſeiſi of the truſtees to uſes in the ſame original conveyance From theſe principles, it follows, that the uſes create by an appointment under a power, muſt be ſuch a would have been good, if limited in the original deed. And that, if ſuch uſes would have been void, if limited in the original deed, as too remote and tending to a perpetuity, they will alſo be void, if limited by an appointment under a power.

Spencer v. Duke of Marlborough, 3 Bro. Parl. Ca. 232.

§ 17. *John* Duke of *Marlborough* deviſed all his eſtates to truſtees and their heirs, to the uſe of his daughter *Harriet* Counteſs of *Godolphin* for life; remainder to Lord *Ryalton* her eldeſt ſon for life; remainder to truſtees to preſerve contingent remainders; remainder to the firſt and other ſons of Lord *Ryalton* in tail male; remainder to Lord *Robert Spencer* (eldeſt ſon of his ſecond daughter *Ann* Counteſs of *Sunderland*) for life; remainder to truſtees to preſerve contingent remainders; remainder to his firſt and other ſons in tail male; remainder to *Charles Spencer* (afterwards Duke of *Marlborough*) in the ſame manner; and inſerted a clauſe in his will, empowering his truſtees, on the birth of each ſon of the ſaid Lord *Ryalton*, Lord *Spencer*, and Lord *Charles Spencer*, to revoke and make void the reſpective uſes limited to their reſpective ſons in tail male, and, in lieu thereof, to limit the premiſes to the uſe of ſuch ſons for their lives, with immediate remainders to the reſpective ſons of ſuch ſons, ſeverally and reſpectively, in tail male: and he

gave

gave his houſehold furniture, gold, plate, *&c.* in the ſame manner.

Upon an application to the Court of Chancery by the truſtees, for further directions in the carrying the truſts of the will into execution, a queſtion having ariſen touching the power given in the will to revoke the uſes limited to the firſt and other ſons in tail, and to limit the premiſes to the uſe of ſuch ſons for life only; the Lord Chancellor declared, that the clauſe of revocation and ſettlement in the will, *as tending to a perpetuity, and repugnant to the eſtate limited, was void and of no effect.*

On an appeal from this decree to the Houſe of Lords, it was argued, on behalf of the appellants, that the ſame policy of the law, which will not permit eſtates to be fixed unalienably in one family for ever, will ſupport and protect the means of preſerving them till they come to that point, at which the miſchiefs of a perpetual reſtraint may commence; the one being as neceſſary an incitement to induſtry as the other. This point, however, is difficult to fix. It has not yet been fixed by any legiſlative or judicial act or authority. It has, indeed, been determined, that eſtates may be made unalienable for the duration of any number of lives in being, and for 21 years beyond, and, in ſome inſtances, ſtill farther: but no judicial determination has ſaid what are the preciſe bounds, which ſhall in no inſtance, nor by any means, be exceeded. The particular mode of conveyance, though it may be new, or, according to the expreſſion in the law-books, of the *tendency* of

the limitation to a perpetuity, is not ſufficient to render ſuch conveyance or limitation void. The interpoſition of truſtees, to ſupport contingent remainders, is an invention introduced about a century ago; an invention, which tended greatly to ſuſpend and reſtrain the powers of alienation, and yet it is now become the eſtabliſhed mode of ſettlement: every limitation of eſtates, and every reſtraint of alienation, has a proportionable tendency, in ſome ſenſe, to a perpetuity. That if the means, made uſe of in this will, to make part of the Duke of *Marlborough*'s eſtate accompany the honours and eſtates for one ſucceſſion beyond the common limitations, were regular and according to the courſe of law, they ſeemed to introduce no danger of a perpetuity; ſince the reſtraint would not go beyond the ſons of the ſeveral noble perſons named in the will; and the immediate deſcendants of ſuch ſons would be tenants in tail, and have a power of alienation. That, if the truſtees had executed this power upon the birth of the appellants, and the reſpondent the Duke, it was apprehended, that a court of equity would not have interpoſed to impeach it; and if, after an execution of the power, the limitations being to perſons *in eſſe*, though for life only, would have been ſupported, the neglect of the truſtees ought not, in equity, to prejudice the infant *ceſtui que* truſts; but, it being a power which the truſtees were enjoined to execute, the court ſhould conſider it as executed from the reſpective times, when it ought to have been executed; that is, from the births of the ſeveral ſons of the reſpective nominees.

On

On behalf of the reſpondent, the Duke of *Marlborough*, it was contended that, in the ordinary courſe of family ſettlements, nothing leſs than an eſtate tail is limited to perſons not *in eſſe*. It has been hitherto underſtood to be the only method of carrying on ſucceſſive remainders of inheritance, by way of ſtrict ſettlement, in the families of ſucceſſive tenants for life, conſiſtently with the rules of law: for, if the grantor ſhould, after the firſt veſted eſtate of freehold, limit a contingent eſtate or uſe for life to a perſon unborn, and then follow it with contingent remainders in tail to the ſons or children of ſuch unborn tenant for life, ſuch contingent limitations of the inheritance would be void. This ariſes from the policy of the law againſt perpetuities, that the veſting of the inheritance or ownerſhip may not be ſuſpended beyond the compaſs of a life or lives in being, or beyond the age of 21 of the firſt unborn tenant in tail, during whoſe infancy the law itſelf will reſtrain his power of alienation. That whoever has the veſted eſtate in land, is the abſolute owner, whether he is tenant in fee-ſimple or tenant in tail; it being equally contrary to the rules of law, to prohibit either from exerciſing the powers of alienation incident to his eſtate. Conditions to reſtrain theſe powers generally are void, as being repugnant to the eſtate limited; and it is admitted, that by the direct limitations in a deed, or deviſes in a will, the grantor or teſtator cannot limit an eſtate tail to a perſon unborn and the heirs of his body, and, immediately upon the event of his birth, direct it to ceaſe as to ſuch a tenant in tail, and continue as to his iſſue. If the law is undoubted, equity muſt follow it; that the ſame

ſubſtantial rules of property may be followed by both juriſdictions. And, as the law will not allow the teſtator, by direct limitations, to turn a contingent remainder-man in tail into a tenant for life, at the very inſtant of time when the eſtate would veſt, ſo, neither will equity allow him, by way of revocation, or, rather, by way of imperative truſt, to enable truſtees, as his inſtruments, to convert the tenant in tail after his birth into a tenant for life; which change the author of the truſt himſelf could not effectuate, by any proper legal limitations originally inſerted in his will. *Quodcunque prohibetur fieri ex directo, prohibetur et per obliquum.* That if the power given to the truſtees, to revoke the uſes upon the birth of the reſpondent, was allowed to be good, it would have been equally ſo, had it extended to all future generations, and made the eſtate for ever unalienable, which would be hardly contended. The teſtator moſt clearly intended a perpetuity, and openly avowed his deſign: with this view, he kept the different acts of parliament conſtantly before him, both in his will and in the deed of 1712; adopting the ſame form of expreſſion, with the ſalvo, of *as far as may be by law.* And, being ſtill conſcious that the ingenuity of his lawyers, however ſkilful, could not keep pace with the legiſlative authority, he requeſted the ſanction of parliament to the *ſettlement of his eſtates purſuant to his will, and according to his intentions expreſſed therein; ſo that the ſame might be unalienable as the honour and manor of* Woodſtock.

Infra ſ. 31.

After hearing counſel on this appeal, the Judges were ordered to deliver their opinions to the Houſe upon the

the following queſtion; *viz.* "Whether by the rules "of law, an eſtate tail, limited to the uſe of perſons "unborn by any deed or will, can, by virtue of any "power given by ſuch deed or will to truſtees, be re- "voked upon the births of ſuch perſons, and a new "eſtate be limited to ſuch perſons for their lives re- "ſpectively, with remainder to the iſſue of ſuch per- "ſons reſpectively in tail male?" And, the Lord Chief Juſtice of the Common Pleas having delivered the unanimous opinion of the Judges in the negative, it was thereupon ordered and adjudged, that the appeal ſhould be diſmiſſed, and the decree therein complained of be affirmed.

§ 18. It is, however, otherwiſe, with reſpect to contingent uſes limited upon or after an eſtate tail; theſe may be given ſo as to take effect at any indefinite period of time, without regard to the rule above ſtated: becauſe a recovery ſuffered by the tenant in tail, before the happening of the event on which the limitation is to ariſe, will deſtroy ſuch limitation.

But not to Remainders after Eſtates Tail.

Vide Tit. 36.

§ 19. Thus, if an eſtate be limited to *A.* in tail, or to *A.* for life, remainder to *B.* in tail, or to the firſt and other ſons of *A.* in tail, a ſimilar limitation over to a ſtranger, to take place on *C.*'s dying without iſſue, would be good, becauſe it may be barred by a recovery.

Goodin v. Clark, 1 Lev. 35.

§ 20. Such is the proviſo frequently inſerted in ſettlements, where, after a limitation of ſeveral uſes in ſtrict ſettlement, a clauſe is inſerted for ſhifting the

1 Inſt. 327 *a.* *n.* 2.

eſtate to a ſecond branch of the family on the event of another eſtate ever coming to any of the perſons to whom the ſettled eſtate is limited, which, by poſſibility, may not happen for many centuries, and then actually take place.

An unborn Perſon may be made Tenant for Life.

§ 21. It was formerly much doubted, whether a limitation for life to an unborn perſon was good; but it is now fully ſettled, that ſuch a limitation is valid.

1 Eaſt. Rep. 452.

Ante ſ. 17.

In a modern caſe, Lord *Kenyon* ſaid,—"I remember hearing Lord *Mansfield* ſay, that when the caſe of *Spencer* v. Duke of *Marlborough* was to be argued in the Houſe of Lords, there was found to be a miſtake in the printed reaſons on the part of thoſe who oppoſed the execution of the power in the manner intended; for, it had been ſtated, that there could not be a limitation to an unborn child for life, but that was found to be wrong; for, certainly, there may be ſuch a limitation: they therefore cancelled that reaſon, and framed another, ſtating the propoſition to be, that there could not be a limitation to an unborn child for life, with limitations to the iſſue of ſuch unborn child in ſucceſſion; and that doctrine was diſtinctly laid down by the learned Judge who delivered the opinion of the Judges in the Houſe of Lords."

Hay v. Coventry, 3 Term R. 83. Fearne Ex. Dev. 326. Caſes & Op. vol. 2. 434.

§ 22. This doctrine has been fully confirmed in two modern caſes; in one of which, Lord *Kenyon* ſaid, "The law is now clearly ſettled, that an eſtate for life may be limited to unborn iſſue, provided the deviſor

" viſor does not go farther, and give an eſtate in ſuc-
" ceſſion to the children of ſuch unborn iſſue."

§ 23. It is now alſo ſettled, that a veſted remainder may be limited upon an eſtate for life to an unborn perſon; and the late Maſter of the Rolls (Lord *Alvanley*) has ſaid,—" A queſtion might ariſe, how far " an unborn child is to be made tenant for life, but " it is eſtabliſhed on good principles in precedent, cer-" tainly that this may be. The doubt was, whether " this was not tying up the eſtate beyond lives in be-" ing, and 21 years afterwards; but that is not ſo, " where the abſolute intereſt is diſpoſed of and veſted, " though part is given for life. For that perſon, with " the perſon having the abſolute intereſt, may diſpoſe " of it; it is not unalienable."

And a veſted Remainder limited on that Eſtate.

Rutledge v. Dorrell, 2 Veſ. Jun. 357.

§ 24. But it is equally clear, from what has been ſtated in the preceding ſections as laid down by Lord *Kenyon*, that an eſtate limited to the iſſue of an unborn perſon, as purchaſers, would be void; for this would be a poſſibility upon a poſſiblity, which the law will in no caſe permit; and would alſo render an eſtate ſo limited unalienable during a longer period than is allowed.

But no Eſtate can be limited to the Iſſue of an unborn Perſon.

§ 25. An eſtate may be limited by an appointment to a perſon for life, who was not born at the time when the deed by which the power was created was executed.

Brudenell v. Elwes, 1 Eaſt. R. 442.

§ 26. A power was given in a marriage ſettlement to the huſband and wife, and the ſurvivor, to appoint the eſtate to all or any of the children of the marriage. The wife appointed an eſtate to one of the daughters for life, remainder to the eldeſt ſon for life; remainder to truſtees to preſerve contingent remainders; remainder to his firſt and other ſons in tail male, remainder to the daughter in fee.

Lord *Kenyon* ſaid, the wife had no power to appoint to the children of unborn children, but ſhe was confined to execute her power among the children. So far, therefore, as ſhe appointed an eſtate for life to the daughter, with remainder for life to the ſon, ſhe did well; beyond that, ſhe exceeded her power in appointing to the iſſue of the daughter, and, therefore, the exceſs was void.

Theſe Rules applicable to Declarations of Truſt of Terms for Years.

§ 27. The rules reſpecting perpetuities are as applicable to declarations of truſt of terms for years, as to any other conveyances; but the caſes on this ſubject being governed by the ſame principles as thoſe by which executory deviſes of terms for years are regulated, will be ſtated under that head.

Tit. 13. ch. 1. ſ. 32.

§ 28. It has been already ſtated, that tenants for life, and alſo tenants for years, may be reſtrained from alienating their eſtates by means of a condition or covenant.

Perpetuities created by Act of Parliament. Tit, 2. ch. 2. ſ. 42.

§ 29. Eſtates may be rendered unalienable by act of parliament, as in the caſe of eſtates tail granted by the

the Crown to individuals as a reward for ſervices, where the remainder or reverſion is veſted in the Crown, which cannot be barred by fine or recovery. Tit. 35. c. 13. Tit. 36. c. 13.

§ 30. There are alſo ſeveral inſtances of particular eſtates which are rendered unalienable by act of parliament. Thus, by a private act, 3 *Cha.* 1., the caſtle, honour, manor, and lordſhip of *Arundel*, together with other eſtates, were limited to *Thomas* Earl of *Arundel* and *Surrey*, and the heirs male of his body; remainder to the heirs of the body of the ſaid Earl; remainder to Lord *William Howard*, and the heirs male of his body; remainder to the heirs of the body of the ſaid Lord *William Howard*; remainder to the ſaid Earl of *Arundel* and his heirs. And it was further enacted, that neither the ſaid *Thomas* Earl of *Arundel*, nor any the heirs male or other heirs of his body, nor any other perſon or perſons his or their heirs male of his or their bodies iſſuing, to whom any eſtate of inheritance of or in the premiſes, or any part thereof, ſhould thereafter come, deſcend, or accrue by force or means of the ſaid act, ſhould thereafter alien, give, grant, bargain, and ſell, or otherwiſe convey away the ſame, or any part thereof, or any other thing do, which ſhould or might be to the diſheriſon of the heirs inheritable by force of the ſaid act. Mountjoy's Caſe, 3 Rep. 3 *b*.

§ 31. By the ſtatute 5 *Ann*, c. 3., it is enacted, that the Duke of *Marlborough* ſhall ſtand and be ſeiſed of the honour, manor, and park of *Woodſtock*, for and during the term of his natural life; remainder to the heirs male of the body of the ſaid Duke; remainder

to all his daughters, and the heirs male of their reſpective bodies, ſeverally and ſucceſſively, according to the priority of their birth, with a proviſo, that neither the Duke or the heirs males of his body, nor any of his daughters or the heirs males of their bodies, ſhould have any power, by fine or recovery, or any other act, to hinder, bar, or diſinherit any the perſon or perſons to or upon whom the ſaid manors, &c. were thereby limited, from holding or enjoying the ſame, according to the limitations in the act mentioned.

TITLE

TITLE XXXIII.

Private Acts of Parliament.

§ 1. *Alienation by matter of Record.*
2. *Private Act.*
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55. *As to Bills relative to Estates in Ireland.*

Section 1.

HAVING explained the nature and operation of deeds entered into by private persons, which derive their effect from the consent of the contracting parties; I shall now proceed to treat of those assurances which are effected by matter of record; that is, where the sanction of a court of record is called in to substantiate, preserve, and be a perpetual testimony of the transfer of property from one person to another. Alienation by matter of Record.

§ 2. The first of these is a private act of parliament, which derives its origin from the following circumstances. Private Act.

It was a common practice, so early as in the reign of *Edw.* 1. for persons to present petitions to parliament for relief in private affairs. These were referred Hale's Jurisd. of Lords, ch. 4. ch. 10.

to

to certain prelates, earls, and barons, who were appointed, at the meeting of every parliament, to be
Id. ch. 12. receivers and tryers of petitions; who, upon examination of the contents of ſuch petitions, indorſed upon them what courſe was to be purſued by the petitioners to obtain redreſs.

§ 3. In theſe caſes, where the petitioners might have relief by the ordinary courſe of law in the King's Courts, the anſwer was, that the petitioners might ſue at common law; and ſometimes the petition was referred to the proper court, in which the caſe was determinable. But in thoſe caſes where the petitioner could have no relief without a new law, made by an act of parliament, either in that particular caſe, or which might by a general purview extend to it, the petition was referred to parliament, and an award was made upon it by the King and the Lords, or by the Lords alone, and ſanctioned by the King, which had all the force and effect of a ſtatute.

Rot. Parl. Vol. 3. 427. N° 78, 79. § 4. In the firſt year of the reign of *Hen.* 4. the commons indirectly claimed a right of concurring with the Lords in the conſideration of petitions, and of joining in the awards made upon them; but the Archbiſhop of *Canterbury* told them, in the King's name, that they were only petitioners, and that all judgments appertained to the King and to the Lords; unleſs it were in ſtatutes, grants, ſubſidies, or ſuch like, the which order the King would from that time be obſerved.

It

It became, however, fully eſtabliſhed in the reign of *Richard* 3. that no award could be made on a private petition, without a formal and complete act of the whole legiſlature: and, therefore, from that period they have been called *private acts of parliament*, and are diſtinguiſhed in the ſtatute book from public ones.

§ 5. A private act of parliament is deſcribed by Lord Ch. Baron *Comyns*, to be a ſtatute, which concerns only a particular ſpecies, or thing, or perſon. And in 39 *Eliz.* it was reſolved by the Court of King's Bench, that the ſtatute 21 *Hen.* 8. c. 13., by which ſpiritual perſons were abridged from having pluralities of livings, was a general act; becauſe it concerned the whole ſpirituality in general: but it was admitted that the ſtatute 18 *Eliz.* c. 6., concerning colleges in the two univerſities, and the colleges of *Eton* and *Wincheſter*, was a private act. It was alſo obſerved that the ſtatutes 13 *Eliz.* c. 10. and 18 *Eliz.* c. 11., concerning colleges, deans, and chapters, hoſpitals, parſon, vicar, or any other having any ſpiritual or eccleſiaſtical living, were general acts: and that the ſtatute 1 *Eliz.*, concerning leaſes, *&c.* made by biſhops, was a ſpecial private act, becauſe it concerned the biſhops only, who are but a ſpecies of the ſpirituality.

What makes an Act private. Dig. Tit. Parl. (R. 7.)

Holland's Caſe, 4 Rep. 76 *a.*

5 Rep. 2 *a.*

§ 6. It is ſaid in the ſame caſe, that, if an act is ſpecial, that extends *ad ſpecies*, *à multo fortiori* it is ſpecial or particular, which extends *ad individua*. Now, although the matter be ſpecial, ſo that under it there are no *individua*, yet if it is general as to perſons,

4 Rep. 76 *b.*

ſons, it is a general act: but, if it concerns *aliquod ſingulare ſeu individuum*, although it be general as to perſons, it will be deemed a private act. So, although the act as to perſons is general, but the matter thereof concerns *individua* or ſingular things, as a particular manor-houſe, houſe, *&c.* or all the manors, houſes, *&c.* which are in one or ſundry particular towns, or in one or divers particular countries, it is a private act.

4 Rep. 77 *a.* § 7. It is alſo laid down by the court in *Holland's* caſe, that every act, although the matter thereof concerns *individua* or ſingular things, yet if it touches the King, is a public act: for every ſubject has an intereſt in the King, as the head of the common-
Plowd. 227. wealth. And it was reſolved in the caſe of *Willion* v. *Berkeley*, that an act, which was made in 35 *Hen.* 8., by which all conveyances made by the Lady *Catherine* (*Henry* the 8th's Queen), or to her, by or to the King, ſhould be valid, was a public act.

10 Rep. 57 *b.* § 8. In a public act there may be a private clauſe, as in the ſtatute 3 *Jac.* 1. the clauſe, which gives the benefices of recuſants in particular counties to the univerſities, is a private act.

§ 9. The ſtatute 23 *Hen.* 6. c. 9., reſpecting bail-
Samuel v. Evans, 2 Term R. 569. bonds, was for a long time conſidered as a private act; but, in a modern caſe, it was held to be a public one.

§ 10. A private

§ 10. A private act is not printed or publiſhed among the laws of the ſeſſions; it remains, however, inrolled among the public records, and in general it muſt be ſpecially ſet forth and pleaded, otherwiſe no judge or jury are bound to take notice of it. But it has lately been a practice to inſert a clauſe in acts of a private nature, declaring that they ſhall be deemed public acts. 1 Inſt. 98 *b.* n. 1.

§ 11. In modern times a private act of parliament reſpecting real property, uſually called an eſtate act, is a conveyance or ſettlement of lands or hereditaments, made under the immediate ſanction of parliament, in caſes where the parties are not capable of ſubſtantiating their agreements without the aid of the legiſlature; and where the carrying ſuch agreements into effect is evidently beneficial to the parties.

§ 12. It would be utterly impoſſible to enumerate the variety of caſes in which private acts of parliament may be obtained. A few of them ſhall however be mentioned. Some Caſes in which private Acts may be obtained.

§ 13. Where a perſon is tenant for life, with remainder to his firſt and other ſons in tail, under a will or ſettlement, and he either has no children, or has children under age; if an opportunity offers of ſelling the eſtate to great advantage, a private act may be obtained veſting ſuch ſettled eſtate in truſtees in fee, diſcharged from the uſes of ſuch will or ſettlement, upon truſt to ſell the ſame, and to lay out the money

in the purchaſe of other lands, to be ſettled to the ſame uſes.

§ 14. Where a perſon, having an eſtate in ſtrict ſettlement, has an opportunity of making an advantageous exchange with another perſon, or is deſirous of exchanging his ſettled eſtate, for another eſtate whereof he is ſeiſed in fee: a private act may be obtained for veſting the ſettled eſtate in the perſon with whom ſuch exchange is agreed to be made; or in the tenant for life himſelf, in fee-ſimple, and limiting the eſtate taken in exchange to the ſame uſes, to which the ſettled eſtate ſtood limited.

§ 15. Where an eſtate, limited in ſtrict ſettlement, is charged with the payment of a conſiderable ſum of money, an act may be obtained for veſting the whole or a competent part thereof in truſtees in fee, upon truſt to ſell the ſame and pay off the debt, and to lay out the ſurplus in the purchaſe of other lands to be ſettled to the old uſes.

§ 16. Where a tenant for life has no power of making long leaſes, and it would be advantageous to the eſtate if it could be let for a long term of years; an act may be obtained for enabling the tenant for life to make long leaſes, under ſuch reſervations and reſtrictions as are neceſſary to render ſuch leaſes beneficial to the eſtate, and to the perſons in remainder and reverſion.

§ 17. Where

§ 17. Where a tenant has expended his own money in making improvements which will be beneficial to the inheritance, or is desirous of making such improvements, an act may be obtained enabling him to charge the estate with the money so laid out, or to be laid out, on such improvements.

§ 18. Where a bishop or other ecclesiastical person has an opportunity of exchanging lands, whereof he is seised in right of his bishopric, for other lands of greater value, a private act may be obtained for confirming such exchange.

§ 19. Where it is necessary that the estates of a lunatic should be sold for payment of debts and incumbrances, an act may be obtained for vesting such estates in trustees; upon trust to sell the same, and to apply the money in payment of the debts and incumbrances, under the direction of the Court of Chancery.

§ 20. Where an estate is vested in several persons, as co-parceners or tenants in common, some of whom are lunatics, or infants, or tenants for life, and a fair and just partition is made thereof; an act may be obtained for confirming such partition, by which the infants, lunatics, and remainder-men, will be bound: and each person, to whom a share is allotted, will acquire the legal estate therein.

§ 21. Where a male infant is desirous of marrying, with the approbation of his parents or guardians, an

act may be obtained enabling him to make a proper settlement on such marriage, such settlement to be as valid as if he was of age. And there is an act in 14 *Edw.* 4. by which it was ordained, that *Henry* Duke of *Buckingham* should be taken, reputed, and adjudged, as a person of full age; and that all things, by him or against him to be done, should be of such force and effect as if they were done at his full age.

Rot. Parl. Vol. 6. p. 128. N° 24.

§ 22. Where something has been omitted in a deed, which is absolutely necessary to carry it into execution; or where there has been a palpable and evident mistake; an act may be obtained to supply such omission, or to rectify such mistake.

Mode of passing private Acts.

§ 23. Where a private act originates in the House of Lords, the mode of proceeding is thus:—A petition is presented to the House of Lords, signed by all the parties interested in the act; stating the facts, and praying leave to bring in a bill for the purpose therein mentioned. This must be presented by a peer: and an order of the house is made, referring the petition to two of the judges, who are authorized and directed to summon all persons concerned in the bill before them; and, after hearing them and perusing the bill, to report to the house the state of the case, and their opinions thereupon, under their hands, and to sign the bill.

§ 24. The petition is then presented to the two judges to whom it is referred, together with a draft of the bill: all the recitals in the bill are proved before them

them in the ſame manner as on a trial in ejectment. The judges then make their report, and certify, that the bill is proper for effectuating the purpoſes intended.

§ 25. The bill is brought into the houſe, read twice, and committed; the ſame proofs muſt be ſubmitted to the committee, which were produced before the judges; and the chairman reports it to the houſe. It is then read a third time, and ſent to the Houſe of Commons, where it goes through the ſame forms, and is ſent back to the Houſe of Lords, to receive the royal aſſent; which is given by the words, "*Soit fait, come il eſt deſiré.*"

§ 26. Where a private act of parliament originates in the Houſe of Commons, a petition is preſented, ſigned by the parties who are ſuitors for ſuch bill; ſtating the facts, and praying leave to bring in a bill, which is preſented to the houſe by a member. A motion is then made, that it be referred to a committee to examine the allegations in the petition. The evidence muſt be produced before this committee, and when concluded, the chairman makes his report, and moves for leave to bring in a bill purſuant to the petition. The bill is then brought in, read twice, and committed: all the evidence is again produced before the new committee, which the chairman reports to the houſe, and moves that the bill be engroſſed. It is then read a third time, and ſent to the Houſe of Lords. There it is twice read, and then committed: the evidence is again produced before the committee

of the Houſe of Lords; the Lord in the chair reports the bill to the houſe; it is read a third time, and then receives the royal aſſent.

§ 27. The conſent of all parties in being, and capable of conſenting, who have the remoteſt intereſt in the property affected by the bill, is expreſsly required to every private act; unleſs (ſays Sir *William Blackſtone*) ſuch conſent appears to be perverſely, and without any reaſon, withheld.

2 Comm. 345.

§ 28. Where infants, or other perſons incapable of acting for themſelves, are to be bound by a private act of parliament, a full equivalent muſt be ſettled upon them, in lieu of what is taken by the act: and, in general, the legiſlature will not ſuffer the property of infants, or other perſons incapable of acting for themſelves, to be altered by a private act; unleſs it appears that they will be benefited by ſuch alteration.

§ 29. A general ſaving is now always added, at the cloſe of every private act, of the rights and intereſts of all perſons whomſoever; except thoſe whoſe conſent is given or purchaſed, and all perſons claiming under them, and who are therein particularly named.

§ 30. By a number of ſtanding orders, made at different times by the Houſes of Lords and Commons, which will be ſtated hereafter, every ſort of precaution appears to have been adopted by the legiſlature, to prevent the poſſibility of ſurpriſe or fraud in obtaining private acts, and particularly as to eſtate bills; which muſt

muſt be referred to two judges, to report on the facts, and the propriety of the bill. But ſtill there have been ſome caſes, in which great impoſition has been practiſed on parliament by falſe evidence.

Vide 34 Geo. 3. c. 66.

§ 31. With reſpect to the operation of a private act, it is as powerful and effective, if duly and properly obtained, as a public one, in binding all thoſe who are intended to be bound by it, and whoſe rights are not ſaved. But it has always been held, that a private act does not bind ſtrangers, even before the general practice of inſerting a ſaving clauſe in every private act was adopted.

Operation of a private Act.

§ 32. Thus, in 21 *Hen.* 7. it was adjudged, in the caſe of the prior of *Caſtle-acre* and the dean of *St. Stephens*, that the act 1 *Hen.* 5. c. 7., which gave the lands of priors aliens to the King, did not extinguiſh an annuity of the prior of *Caſtle-acre*, which he had out of a rectory, parcel of a priory alien, though there was not any ſaving in the act.

8 Rep. 138 *a.*

§ 33. So, in a caſe in 8 *Jac.* where the queſtion was, whether the act 22 *Edw.* 4. c. 7. which under certain circumſtances authorizes the proprietors of grounds in foreſts, after a felling, to incloſe them without the King's licence, for ſeven years, to preſerve the ſpringing wood, ſhould be conſtrued ſo as to exclude perſons having right of common: upon this point Lord *Coke* reports one of the reaſons, upon which the judges of the Common Pleas adjudged that the commoners were not bound by the ſtatute. "It

Barrington's Caſe, 8 Rep. 136.

" appears by the preamble, between what perſons, and " for and againſt what perſons this act was made; " and the parties to this great contract, by act of " parliament are the ſubjects having woods, &c. " within foreſts, chaces, and purlieus of the one part, " and the King and the other owners of the foreſts, " chaces, and purlieus of the other part; ſo that the " commoners are not any of the parties between " whom this act was made," and cited the caſe of the prior of *Caſtle-acre*. — And, in a ſubſequent caſe, Lord *Hale* ſaid—" Every man is ſo far " party to a private act of parliament, as not to " gainſay it, but not ſo as to give up his intereſt; 'tis " the great queſtion in *Barrington*'s caſe, 8 *Co.* The " matter of the act there directs it to be between the " foreſters and the proprietors of the ſoil; and there- " fore it ſhall not extend to the commoners, to take " away their common. Suppoſe an act ſays, whereas " there is a controverſy concerning land between *A.* " and *B.*, 'tis enacted that *A.* ſhall enjoy it; this " does not bind others, though there be no ſaving, " becauſe it was only intended to end the difference " between them two."

S. C. Godb. R. 167. Chalk and Peter's Caſe.

Lucy v. Livingſton, 1 Vent. 176.

Will bar an Eſtate Tail, and all Remainders over.

§ 34. It was formerly the uſual practice, where a tenant in tail applied for a private act of parliament, to bar his eſtate tail, and convert it into a fee ſimple, that the perſons in remainder and reverſion ſhould give their conſent to the act; but although ſuch conſent be not given, yet an eſtate tail, and all the remainders,

remainders, and the reverſion depending on it, may be barred by a private act of parliament.

§ 35. This point is fully eſtabliſhed in an opinion, given by the late Mr. *Booth* on the following caſe: Caſes and Opinions, 8vo. vol. 2. p. 400.

The Duke of *Kingſton* being tenant for life under the will of *Evelyn* Duke of *Kingſton*, with remainder to his firſt and other ſons ſucceſſively in tail male, remainder to *Granville* Earl *Gower* in tail male, with ſeveral remainders over. The Duke, having no ſon, agreed with Lord *Gower* for the purchaſe of his intereſt in the eſtates thus deviſed, in conſideration of 21,000 *l.* And, in order to carry this agreement into execution, the Duke and Lord *Gower*, without the conſent of any of the perſons in remainder, applied for an act of parliament, ſtating the preceding facts; and ſtating that, although Lord *Gower* was enabled by law, with the concurrence of the Duke, to bar the remainder in tail veſted in him, and all the remainders, and the reverſion expectant thereon, yet, as the premiſes, agreed to be purchaſed by the Duke, were limited, after his death, to his firſt and other ſons in tail male, they could not be veſted in him in fee-ſimple, without the aid of an act of parliament. Tit. 36.

A private act was accordingly obtained, by which it was enacted, that the eſtates in queſtion ſhould be veſted in two perſons and their heirs, freed from the uſes declared in the late Duke's will, and ſhould be to the uſe of the then Duke and his heirs: and divers other eſtates of equal or greater value were veſted in two

two perſons, to the uſe of the Duke of *Kingston* for life; remainder to truſtees to preſerve contingent remainders; remainder to his firſt and other ſons in tail male; remainder to the Duke in fee; with a general ſaving of the rights of all perſons, except the Duke and his heirs, and the firſt and other ſons of his body and their heirs male, and Lord *Gower* and his heirs male, and all perſons claiming any eſtate in the premiſes under the will of *Evelyn* Duke of *Kingston*.

The Duke of *Kingston* being deſirous of ſelling one of the eſtates veſted in him in fee under this act, a doubt was ſuggeſted, touching the effect of the act, with reſpect to the perſons claiming under the late Duke's will in remainder, expectant on the determination of the eſtate tail veſted in Lord *Gower*, how far their rights and intereſts were barred by the act, as well in the eſtate whereof the uſes were diſcharged by the act, as in the eſtates ſettled by way of equivalent; the ſame being limited to the Duke in fee-ſimple upon failure of iſſue male of his own body, and not to the uſes limited in the will.

In anſwer to this objection, Mr. *Booth* gave his opinion, that, ſuppoſing the rules and orders of the Houſe of Lords, with reſpect to ſummoning all perſons concerned in intereſt to appear and conſent, were not obſerved, this would not invalidate the act; for either houſe of parliament might diſpenſe with their own orders, whenever they thought fit; but here was no grievance, no irregularity. The rights of the perſons in remainder, after Lord *Gower*'s eſtate tail, were of

Vide Standing Order of 19th April 1799 infra.

no

no value; ſince, by a common recovery duly ſuffered, thoſe rights could be annihilated in the next term. As they were obliged to go to parliament, they were adviſed, and rightly adviſed, that to ſuffer four recoveries, (for the lands lay in four counties), would be to go to a needleſs expence: for that, in a caſe, where parliamentary aſſiſtance was, on other accounts, indiſpenſably neceſſary, there, the parliament would ſo frame their words, which were to become a law, as to have the ſame force and operation, and to bar all rights that would be barred by a common recovery. *Fruſtra fit per plura, quod fieri poteſt per pauciora,* was a rule of equity, reaſon, and good ſenſe.

§ 36. The doctrine, laid down by Mr. *Booth*, has been fully confirmed by a modern caſe, in which the Court of Chancery held, that a private act would bar an eſtate tail, and all remainders expectant thereon, and alſo the reverſion, although the rights of the remainder-men were not excepted in the ſaving.

§ 37. *Robert Weſtby* being tenant for life under a ſettlement of an eſtate in *Lancaſhire*, with remainder in fee to four perſons as heirs at law to the ſettlor, and being tenant in tail of another eſtate in *Yorkſhire* with remainders over, under which the defendant *John Weſtby* claimed, and having occaſion for money to pay debts, and one of the heirs at law being an infant, a private act of parliament was obtained in 1731, on the application of *Robert Weſtby* and the heirs at law; by which, a part of the *Lancaſhire* eſtate was veſted in truſtees to be ſold for the payment of *Robert Weſtby*'s debts; Weſtby v. Kiernan, Amb. R. 697. 4 Geo. 2. c. 29.

debts; and the *Yorkſhire* eſtate was veſted in truſtees to the uſe of *Robert Weſtby* for life only, with limitations over as in the ſettlement; with a power for *Robert Weſtby*, in caſe of failure of iſſue male of his body, to charge the *Lancaſhire* eſtate with a ſum of money. The ſaving clauſe, at the end of the act, ſaved the rights of all perſons except thoſe of *Robert Weſtby*, of the reverſioners of the *Lancaſhire* eſtate, and of the heirs and iſſues of *Thomas Weſtby*, but no exception of the heirs or iſſues of —— *Weſtby*, under whom the defendant *John Weſtby* claimed.

Robert Weſtby, by deed, in 1732, executed his power, and died without iſſue; having deviſed the money, charged by the execution of the power, to his executors upon ſeveral truſts.

Upon a bill filed by the executors to have the ſums raiſed, which were charged by *Robert Weſtby*, a queſtion aroſe, whether the power, given by the act of parliament to charge the *Yorkſhire* eſtate, could take place againſt the defendant *John Weſtby*, who claimed under —— *Weſtby*, the perſon entitled in remainder upon the death of *Robert Weſtby*, who died without iſſue.

Lord *Apſley*, after argument, was clear of opinion, that *Robert Weſtby* being tenant in tail of the *Yorkſhire* eſtate, the right of thoſe in remainder was, and was meant to be, barred by the act of parliament: and there was no occaſion to except their rights, as was done in other caſes, where the act paſſes upon the ap-

plication of a tenant for life; for *Robert Weſtby*, being tenant in tail, might have barred the remainder by a recovery: and, therefore, this caſe differed from that of the Duke of *Somerſet*, who procured an act of parliament for the exchange of livings; he was only tenant for life; and, the right of thoſe in remainder not being excepted out of the ſaving clauſe, they were not bound by the act. Infra. f. 39.

§ 38. But, where a tenant for life enters into an agreement to convey the fee-ſimple, and a private act is paſſed for eſtabliſhing ſuch agreement, in which is a ſaving of the rights of all perſons not parties to the act, it will not affect the perſons entitled to the remainder expectant on the life eſtate. But not a Remainder after an Eſtate for Life.

§ 39. Thus, in the caſe alluded to by Lord *Apſley*, in *Weſtby* v. *Kiernan*, it appeared, that *Charles* Duke of *Somerſet*, having the honour of *Petworth*, was deſirous of acquiring the rectory of *Petworth*, which belonged to *Eton* college; and not having any benefice or advowſon, whereby he could tempt the college to give him the rectory of *Petworth* in exchange, applied to and prevailed on the crown, to give to the college the advowſon of *Worpleſdon*; and the Duke, in return, agreed to give the crown the rectory of *Overblowes* as an equivalent. Whereupon, it was agreed, that the advowſon of *Worpleſdon* ſhould be veſted in *Eton* college, the rectory of *Petworth* in the Duke, and the rectory of *Overblowes* in the crown, for ever. This agreement was confirmed by a private act of parliament in 4 & 5 *Wm.* and *Mary*; whereby it was enacted, that the Provoſt of Eton v. Ep. Winton, 3 Wilſ. R. 483.

the advowſon of *Overblowes* ſhould be, and thereby was veſted and ſettled in their Majeſties and their ſucceſſors, in right of their crown, for ever; that the advowſon of *Worpleſdon* ſhould be ſettled and veſted in the provoſt and college of *Eton* and their ſucceſſors for ever; and that the advowſon of *Petworth* ſhould be, and was thereby veſted in the Duke and Ducheſs of *Somerſet* and their heirs; with a ſaving of the rights of all perſons (other than their Majeſties, *&c.* the Duke and Ducheſs and their heirs, and *Eton* college and their ſucceſſors) to the ſaid advowſon, or any of them.

It was afterwards diſcovered, that, by a ſettlement made in 1687, (which was previous to this act), the rectory of *Overblowes* was ſettled to the uſe of the Ducheſs of *Somerſet* for life, remainder to their ſon *Algernon* Earl of *Hertford* in tail male, remainder to their iſſue female; and that, Lord *Hertford* having died without iſſue male, the rectory veſted in his ſiſter Lady *Catherine*, who married Sir *William Wyndham*, and died leaving *Charles*, afterwards Earl of *Egremont*, her eldeſt ſon, who died leaving *George* Earl of *Egremont* his eldeſt ſon. It was admitted on both ſides, that, upon the death of the Duke of *Somerſet*, the rectory of *Overblowes* veſted in Lord *Egremont*, becauſe he was within the general ſaving of the act.

Conſtruction of private Acts.

§ 40. Private acts are conſtrued in the ſame manner as conveyances that derive their effect from the common law; and, therefore, when any doubt ariſes as to the conſtruction of a private act, the court will conſider what the object and intention of the parties

was

was in obtaining the act, and will, if poſſible, give effect to that intention.

§ 41. In the caſe of the Provoſt of *Eton* v. the Biſhop of *Wincheſter*, which has been already ſtated, the crown having loſt the advowſon of *Overblowes*, to which Lord *Egremont* became entitled under the ſettlement of 1687, by the death of *Algernon* Earl of *Hertford* without iſſue male, claimed from the college of *Eton* the advowſon of *Worpleſdon*, and preſented to it; upon the principle, that the whole tranſaction became void by the defect of title in the Duke of *Somerſet* to the advowſon of *Overblowes*; whereupon, the college of *Eton* brought a *quare impedit*. Ante f. 39.

It was contended, on the part of the crown, that private acts of parliament were to be conſtrued like deeds; and that this act ſhould be conſidered as an exchange, in which there was a mutual warranty; and that the eviction of the advowſon of *Overblowes* by Lord *Egremont*, gave the crown a right to be reſtored to the advowſon of *Worpleſdon*. But it was anſwered, on the part of the college of *Eton*, that the act could not be conſidered as an exchange; becauſe an exchange could only be made between two parties: and, therefore, judgment was given for the college. Tit. 32. c. 8. f. 5.

§ 42. A private act of parliament was paſſed in the year 1777, for incloſing and dividing the common and waſte grounds within the manor of *Tealands*; by which it was enacted, that the commiſſioners ſhould ſet out, allot, and aſſign unto the lady of the ma- Townley v. Gibſon, 2 Term. R. 701.

nor 20 ſtatute acres of the common and waſte grounds, in lieu of, and as a compenſation for, her right and intereſt in and to the ſoil of the reſidue of the ſaid common and waſte grounds reſpectively. And then, that the commiſſioners ſhould allot and aſſign the reſidue of the ſaid common and waſte grounds unto, for, and amongſt the ſaid lady of the manor, for and on account of her meſſuages, tenements, lands, and hereditaments within the ſaid manor, in reſpect whereof ſhe was entitled to right of common upon the ſame common and waſte grounds, and to the ſeveral other perſons having right of common, or other right, intereſt, property, or privilege thereon, and to their heirs and aſſigns for ever, according and in proportion to their ſeveral and reſpective rights, *&c.*

A ſubſequent clauſe directed, that " all and every " the allotments, *&c.* to be made under the act, ſhould " be veſted *in fee-ſimple* in the ſeveral and reſpective " perſons, *&c.* to whom the ſame ſhould be ſet out " or allotted, and their heirs, aſſigns, and ſucceſſors " reſpectively for ever, abſolutely freed and diſcharged " of and from all cuſtomary tenures, rents, fines, boons, " and ſervices whatſoever; and that the ſeveral ſhares " or allotments ſo to be ſet out as aforeſaid, ſhould be " in lieu of, and in full compenſation and ſatisfaction " for, all rights of common and other former property, " privilege, right, *&c.*; and that all rights of com- " mon, together with all former rights, intereſts, pro- " fits, *&c.* in and upon the ſame, ſhould, from and " immediately after that time, ceaſe, and be for ever " barred and extinguiſhed; provided always, and it

" was

" was further enacted, that *nothing in that act contained* " *ſhould extend to prejudice, leſſen, or defeat the right,* " *title, or intereſt of the ſaid lady of the ſaid manor,* " *her heirs or aſſigns, of, in, or to the ſeigniories incident* " *or belonging to the ſaid manor,* but that ſhe and they, " and every of them, ſhould and might at all times " thereafter hold and enjoy all *rents,* fines, ſervices, " courts, perquiſites, and profits of courts, goods and " chattels of felons and fugitives, felons of themſelves, " and put in exigent, deodands, waifs, eſtrays, for- " feitures, and *all other royalties and manerial juriſdic-* " *tions whatſoever,* in and upon the ſaid common and " waſte grounds, thereby intended to be incloſed as " aforeſaid, to the ſaid manor, or the lord or the lady " thereof for the time being, incident, belonging, or " appertaining, and the ſame in as full, ample, and " beneficial a manner, to all intents and purpoſes, as " ſhe or they might or could have held or enjoyed the " ſame, in caſe this act had not been made."

Before the paſſing of this act, the lady of the manor was entitled to the mines and minerals lying under the ſoil of the manor, of which they had made ſeveral leaſes; the laſt of which was made to one *Tiſſington* in 1757, to hold from the 25th of the enſuing *March* for 21 years, under which the mines were worked and continued to be ſo, till ſome time in the year 1759; but, from that period, the leſſee diſcontinued the works, though the leaſe was ſubſiſting at the time when the act was made.

The queſtion was, whether the lady of the manor was entitled to the mines under the clauſe of reſervation in the act, allotting the incloſures to the ſeveral tenants of the manor?

It was contended on behalf of the tenants of the manor, that the act barred the lady of the manor from claiming any future right to the mines and minerals in the manor: for, by the firſt clauſe, it appeared, that the commiſſioners were to ſet out 20 acres to the lady of the manor, in lieu of and as a compenſation for her right and intereſt in the ſoil of the reſidue of the waſte ground. And, on the other hand, that all allotments to the ſeveral tenants were to be in fee, which the act declared ſhould be a full compenſation for all rights of common and other former property, privilege, right, title, intereſt, claim, and demand whatever. That, if the act had ſtopped there, there could have been no doubt but that the lady of the manor would have had no right whatever to the mines in the allotments. But, if the clauſe of reſervation entitled her to them, and a right ſtill remained in her of digging in thoſe incloſures, without making any allowance for the injury ſuſtained by the owner of the ſoil, all the purpoſes of the act would be defeated. The latter clauſe only provided, that the lady of the manor ſhould ſuffer no prejudice as to her right to all ſeignories incident to the manor; and that ſhe ſhould ſtill enjoy all rents, fines, ſervices, *&c.* and other royalties and manerial juriſdictions; but there was nothing in that clauſe which had the leaſt reference to the ſoil of the manor; and the particular enumeration of the things intended was deciſive,

that

that mines were not intended to be reſerved, otherwiſe they would have been mentioned. The word ſeignories, in the former part of the clauſe, was defined and explained by the words which followed, and could only mean things of the ſame nature as thoſe mentioned.

On the other ſide, it was ſaid, that this being a private act, paſſed at the requiſition of the parties concerned, was to be conſtrued like all other private agreements; and, conſequently, the court would conſider the probable intention of the parties to be collected from the ſituation and ſtate of their ſeveral rights, at the time when the act paſſed. The anceſtor of the defendant was the lady of the manor; and, as ſuch, ſhe would have been entitled, not only to the mines under the waſtes, but alſo under the copyhold incloſures, unleſs there had been ſome cuſtom to exclude her. The right of theſe mines exiſted in the lady of the manor, ſeparate from the intereſt in the ſoil, as appeared from the leaſes of the mines, during the continuance of the laſt of which the act paſſed. It was admitted, that the words in the firſt clauſe were large enough to comprehend mines, if ſuch had been the intention of the parties; but that could not have been ſo intended; for then the ſubſiſting leaſe would have been affected, and the rents thereby reſerved, which certainly could not have been intended; inaſmuch, as they were reſerved expreſsly by the word "rents" in the ſaving clauſe, there being no other rents, to which that word could relate. And, there being a reſervation of rents to the lord, the right to the mines themſelves

ſelves (out of which the rent iſſued) would alſo be reſerved to him. Beſides, there were other words in the ſaving clauſe, which were ſufficiently comprehenſive to reſerve the right of digging for mines, ſuch as ſeignories and royalties. If, therefore, the mines had been intended to have been taken out of the lord, there ſhould have been expreſs words for that purpoſe.

Lord *Kenyon* Chief Juſtice.— " I agree that private " acts of parliament are to be conſtrued according to " the intention of the parties; but then, that intention muſt be collected from the words uſed by the " Legiſlature, without doing violence to their natural " meaning. The defendant's counſel has ſuppoſed, " that mines are a diſtinct right from the right to the " ſoil: but I do not think ſo, where they are under the " ſoil of the lord of the manor. In caſes of copyholds, a lord may have a right under the ſoil of the " copyholder: but, where the ſoil is in the lord, all " is reſolvable into the ownerſhip of the ſoil; and a " grant of the ſoil will paſs every thing under it. The " only word in the ſaving clauſe, which affords any " ground for argument, is the word " *rents*;" but, " when we ſee how that word is uſed with the others " in that part of the act, it cannot be taken to include " mines. At the time of paſſing this act of parliament, the mines under the waſte ground were in " the lady of the manor, as part of the demeſnes: " ſhe intended to give up ſeveral rights to the tenants, " for which ſhe has reſerved a ſatisfaction. Then, " how do the tenants hold their allotments under the " act? They could not take as copyholders, unleſs " the

" the act of parliament had ſo directed; but they take " their allotments as freehold eſtates of inheritance. " It is extremely clear, that no new tenure can be " created, unleſs by the authority of parliament, " ſince the ſtatute of *quia emptores;* nor can any per- " ſon reſerve to himſelf a right of eſcheat. Then it " was urged by the defendant's counſel, that the act " of parliament could not affect the leaſe, which was " in exiſtence when it paſſed: it certainly would not; " neither would it have been affected, if the lady had " ſold her eſtate in the manor, but the alienee would " have become the landlord, and entitled to the be- " neficial intereſt reſerved by the leaſe: ſo, here the " leaſe will remain valid, but the right to the rent of " the mines will paſs to the perſon, in whoſe favour " the allotment was made under the act. For we can- " not narrow the words of this act; and that transfers " all the right in the ſoil to the ſeveral tenants. There " is no doubt, but that the mines might have been " reſerved. If it had been ſo intended, it would have " been by expreſs words; but there is no ſuch reſer- " vation here. The word " *rents* " is explained by " the other words uſed; but thoſe rights, which are " reſerved, are mere badges of royalty, incorporeal " rights, and other fruits of tenure of the like ſort."

Aſhurſt Juſtice.— " It does not appear to me, that " mines were intended to be reſerved to the lady of " the manor. The object of an incloſure is, that the " lord of the manor, in reſpect of his ſeignory and " waſte, ſhould have ſome part of the ground, to be " allotted to himſelf in lieu of his manerial rights;

" and the other lands are allotted to the proprietors of " the other incloſed lands within the manor; and theſe " are not made copyholds, but the grantees take them " as freeholds of inheritance. Therefore, *primâ facie*, " they are entitled to all mines, *&c.* belonging to the " land. Then, what is there in this caſe to take them " out of the grantees, and veſt them in the lord? " The ſaving clauſe only amounts to what, perhaps, " the law would otherwiſe have reſerved without ſuch " a clauſe; for, as the rights reſerved are of an in- " corporeal nature, they would ſtill have remained in " the lady, becauſe there is nothing in the act to diveſt " her; but they have nothing to do with the ſoil or " freehold, in which mines are included."

Buller Juſtice.— " The general object of this inclo- " ſure act was, to extinguiſh all the antecedent rights " of the ſeveral parties intereſted, and to create others " in lieu of them; in doing which, it was thought " right to make particular exceptions. Now, when " the Legiſlature have made ſome exceptions, we can- " not imply others which they have not made. As to " the leaſe, which did not expire till a year after the " act paſſed, it probably was not thought of by either " party at the time; the mine had not been worked " ſince the year 1759; it was, perhaps, therefore " abandoned, and not thought to be of any value for " the ſhort remainder of the term. However, the " court cannot carry the exception beyond the words " of the act; and all the reſervations are of incor- " poreal rights. By the general words, the ſoil paſſed " by the allotments to the ſeveral proprietors; and

" mines are conſidered as part of the ſoil. I do not " agree with the defendant's counſel, that the lord may, " unleſs reſtrained by cuſtom, dig for mines on the " copyholder's lands: but it is not neceſſary to con- " ſider that queſtion here."

Groſe, Juſtice.— " It is extremely dangerous to con- " ſtrue either deeds or acts of parliament according to " ſuppoſition. The queſtion here is, whether, under " this act of parliament, the mines paſſed to the te- " nants? The ſoil undoubtedly paſſed; now, what " are the mines but part of the ſoil? And every " thing, which was intended to be reſerved to the lady " of the manor, is expreſſed; and all thoſe rights are " incorporeal hereditaments, and not like mines. " Then, not only the general words, under which the " allotments were made, are large enough to carry " mines, but the ſubſequent exception is not broad " enough to ſave them. At the ſame time, it is rather " extraordinary, that ſo valuable a part of the pro- " perty as mines, ſhould not have been expreſsly re- " ſerved to the lady of the manor, if it had been ſo " intended."

§ 43. With reſpect to the general ſaving clauſe, which is inſerted in every private act of parliament, difficulties have ariſen on the conſtruction of it, where it is contradictory to the body of the act. It is laid down in the caſe of *Alton Woods*, that a ſaving in an act of parliament, which is repugnant to the body of the act, is void; as in *Plowden* 565, where the ſuppoſed attainder of the Duke of *Norfolk* was, by act of parliament

Effect of the General Saving.

1 Rep. 47 *a*.

1 *Mary*, declared to be void *ab initio*, saving the eſtates and leaſes made by King *Edward* 6th. The ſaving was held to be void: for, where the attainder was declared to be void, the ſaving was againſt the body of the act, and therefore void.

§ 44. This doctrine appears to have been ſupported in modern times; it being held, that the general ſaving clauſe in a private act of parliament will not control the proviſions, contained in the body of the act, but muſt be ſo expounded as to be rendered conſiſtent with the body of the act, or elſe be void.

Wood v. Cecil, 2 Vern. 711.

§ 45. A private act of parliament was obtained for ſale of Lord *Stawell*'s eſtate, by which it was enacted, that the eſtate ſhould be veſted in truſtees to be ſold; and that the money, ariſing from the ſale, ſhould be, in the firſt place, applied to pay the mortgagees, and afterwards to pay the creditors by ſtatutes, judgements, and recognizances. And, at the cloſe of the act, there was a general ſaving of the rights of all perſons except the heir at law, and others of Lord *Stawell*'s family. Several of the ſtatutes and judgments were prior to ſome of the mortgages; and, there being a decree for ſale and execution of the truſt created by the act, a queſtion aroſe upon a ſpecial report, whether the mortgagees ſhould be paid in the firſt place, or whether the creditors by ſtatutes, judgements, and recognizances, ſhould be let in according to their priority, or be poſtponed to the mortgagees.

For

For the creditors by ſtatutes, judgements, and recognizances, it was inſiſted that their ſecurities bound the land, as well as the mortgages: they were, both in law and equity, to be conſidered as having a prior right to the ſubſequent mortgagees. And, although in the beginning of the act it was provided, that the mortgagees ſhould be paid in the firſt place; yet there was a general ſaving of the rights of all perſons, except the heir at law, and thoſe of Lord *Stawell*'s family; and that ſaving ſet the matter at large again, and reſtored them to their priority.

Lord Chancellor.—"The act expreſsly provides, "that the mortgages ſhall be paid in the firſt place, "and the general ſaving muſt not control the expreſs "proviſion of the act, but muſt be ſo expounded as "to conſiſt with the expreſs preference given to the "mortgagees: and he muſt decree the execution of "the truſt accordingly, but ſeemed to admit that, by "virtue of the general ſaving in the act, they might "make uſe of their incumbrances as they could at "law."

§ 46. In the caſe of *Weſtby* v. *Kiernan*, which has already been ſtated, the right of the remainder-man, expectant on the determination of the eſtate tail, was ſaved, not being excepted in the general ſaving: and yet he was held to be barred; for otherwiſe the act of parliament would have been nugatory. Ante f. 37.

§ 47. Where the enacting part of an act of parliament, for incloſing the waſtes and commons of a

manor, expreſsly exonerates certain lands from the payment of tithes, the rector will be barred from claiming tithes out of thoſe lands, though he is comprehended in the ſaving clauſe of the act.

Riddle v. White, 4 Gwill. 1387.

§ 48. By an act of parliament made in 13 *Geo.* 3., for incloſing and dividing certain moors, commons, or tracts of waſte lands, within the pariſh and manor of *Lancheſter*; it was enacted, that the commiſſioners therein named, ſhould, after ſetting out thirty acres of the ſaid land to the curate of *Latley*, and other portions of land for the purpoſes therein mentioned, let out the reſidue of the ſaid land (except ſo much thereof as was therein-after directed to be ſold for defraying the expences of obtaining the ſaid act, and other purpoſes therein mentioned), unto and amongſt the biſhop of *Durham*, who was the lord of the ſaid manor, and the ſeveral other perſons having rights of common thereon, according to the value of their reſpective eſtates to which ſuch rights of common belonged; and that all ſuch lands, as ſhould be allotted to any perſons in reſpect of their reſpective lands and tenements, ſhould be held by them in the ſame manner as their reſpective meſſuages, *&c.* in right of which ſuch allotments were holden reſpectively, and ſubject to the ſame ſpecies of tithes only, in the ſame manner, and to the ſame perſons, as they were accuſtomed to pay.

And it was by the ſame act declared, that the ſaid commiſſioners might ſell ſo much of the ſaid moors or commons as they ſhould think fit, to raiſe money to pay

pay the expences attending the obtaining and executing the act, and the expence of dividing the ſaid moors and commons, and the expence of ſetting out and making public highways, roads, bridges, and drains, appointed by the act to be ſet out, and the expence of incloſing and fencing the allotments, before directed to be made to the curate of *Latley*; "And it was by the ſaid act declared, that the "perſons, who ſhould become *purchaſers* of the ſaid "lands ſo to be ſold, *ſhould hold the ſame diſcharged* "*from the payment of all manner of tithes*, and other "eſtates, rights, and duties whatſoever, to any perſon "or perſons politic or corporate."

And in the ſaid act was a clauſe in the words following:—"Saving always to the King's moſt excel-"lent majeſty, his heirs and ſucceſſors, and to all and "every other perſon and perſons, politic or corporate, "his, her, and their ſucceſſors, executors, and admi-"niſtrators,, (other than the lord of the manor of "*Lancheſter* aforeſaid, and all other perſons entitled "to a right of common in or upon the ſaid moors "or commons, his, her, and their heirs, ſucceſſors, "executors or adminiſtrators reſpectively; and the "perſon or perſons, bodies politic or corporate, his, "her, and their heirs, ſucceſſors, executors and ad-"miniſtrators, who ſhall by virtue of this act make "any claim, affecting the boundaries of the ſaid "moors or commons, or any claim of any right of "common thereon, which ſhall be adjudged and de-"termined againſt him, her, or them, as aforeſaid), "all ſuch right, title, and intereſt, as they, every or

"any

" any of them had or enjoyed, of, in, to, or out of " the ſaid moors or commons, hereby directed to be " divided and incloſed as aforeſaid, or could, or " might, or ought to have had or enjoyed, in caſe " this act had not been made."

" And be it further enacted, that this act ſhall be " deemed and taken to be a *public* act, and ſhall be " judicially taken notice of as ſuch, by all judges and " juſtices, and other perſons whomſoever, without " ſpecially pleading the ſame."

The impropriator of the pariſh of *Lancheſter*, ſome years after this act, filed his bill in the Exchequer againſt certain occupiers of land in the pariſh; ſtating, that the commiſſioners under this bill had cauſed twelve plots of land to be ſold, to raiſe money for defraying the expences of the bill; that the defendants, who were purchaſers thereof, immediately improved their lands, and converted them into arable ground. That the plaintiff, to prevent any doubt which might ariſe whether the ſaid lands were to be conſidered as barren land, and as ſuch exempt from the payment of tithes during ſeven years, had not during that time required any tithes to be paid to him.

Tit. 22. f. 61.

That the defendants had, during the preceding years, been the occupiers of the lands which had been ſo ſold, and had grown upon them great quantities of wheat, *&c.*; and requiring a diſcovery of the tithes which had ariſen during thoſe years, and praying an account

account of ſuch tithes, and that the defendants might be decreed to pay the amount thereof to the plaintiff.

To this bill the defendants demurred; for that it appeared by the bill, that the lands, which were in the defendants occupation, were freed and diſcharged from the payment of all manner of tithes by the ſaid act of 13 *Geo.* 3.

In ſupport of the demurrer, it was contended: 1ſt, That the plaintiff's right, as impropriator, was not ſaved by the ſaving clauſe in the act: that it was clear it was not ſaved by the words of that clauſe, becauſe it ſaves only rights, of, in, to, or out of the moors or commons, and a right to tithes is not a right of, in, to, or out of land, but is a right of ſomething collateral to the land. That tithes are an eccleſiaſtical inheritance, collateral to the eſtate of the lands, and of their proper nature due only to eccleſiaſtical perſons by the eccleſiaſtical law.

2d, That the impropriator's right not only was not ſaved by the ſaving clauſe, but that it did not appear to be the intention of the legiſlature to ſave it; becauſe it was highly reaſonable that the impropriator, who derived great benefit from this act (by which the lands, out of which the tithes aroſe, were rendered much more profitable than they were before) ſhould bear his proportion of the expence of the act being paſſed. That, by the lands, which were ſold to raiſe money for paying the expence of this act, being exempted from

from tithes, the impropriator bore his juſt proportion of the expence, but nothing more.

3d, That if, however, the words of the ſaving clauſe did extend to the impropriator, and it could be ſuppoſed that the legiſlature intended by that clauſe to ſave his right, yet the clauſe was void; becauſe it was repugnant to the body of the act, which expreſsly declares, that the lands to be ſold ſhall be diſcharged from the payment of tithes: that the deciſions of courts of juſtice, with reſpect to private acts of parliament, were exactly the ſame as with reſpect to deeds, and in a grant every exception, which is repugnant to the grant, is void. That this, however, was a public act; and every clauſe in an act of parliament, repugnant to the body of the act, is void.

4th, That it would be very hard on the defendants, if they were compelled to pay tithes for lands, which they had purchaſed upon the faith of an act of parliament, declaring that they were diſcharged of tithes.

On the other hand, it was inſiſted for the plaintiff, that this act of parliament was to be conſidered as a public act, only for the purpoſe of being judicially taken notice of by the judges, without being ſpecially pleaded, and for no other purpoſe whatſoever. That acts of this kind, though declared for the ſpecial purpoſe mentioned in them to be public acts, are never kept in the parliament roll, are never printed among the ſtatutes; and do not receive the royal aſſent in the ſame words by which public acts receive

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it—"*Le roi le veult*;"—but in the words by which private acts receive the royal assent,—"*Soit fait, comme il est desiré:*" that they were, in fact, to be considered as parliamentary conveyances, and not as public statutes, which concern all the King's subjects.

That the saving clause was not void; though it was repugnant to the body of the act; because it was of the very nature of a saving clause, that it should be repugnant to the body of the act, the object of it being to control every thing in the act, as far as it affected the interests of persons not parties to the act. That, if saving clauses were not to be so considered, they were useless; because, if the rights of the parties were not expressly disposed of by the act, they would be saved to them even though there were no saving clause; as, if here the act had not declared that the lands should be discharged of tithes, the impropriator would have been intitled to tithes, though there had been no saving clause. A saving clause may have an operation, though not expressly repugnant to the body of the act; as if it had been declared in this case that the land should be freed from all charges, without mentioning tithes, and then there had been a clause, saving the right of the impropriator. That the cases of grants were totally unlike the present: for the reason, why an exception contrary to the words of the grant is void, is, because the words of the grant are to be taken most strongly against the grantor.

Lord Chief Baron:—"Without going into an elaborate argument on this case, it is sufficient to say, "that

" that it falls within all the principles of a contradic-
" tion between a ſaving and an enacting clauſe in an
" act of parliament; and that the caſe is exactly the
" ſame as that of the Duke of *Norfolk*, as *Alton*
Ante f. 45. " *Wood's* caſe, and the caſe in *Vernon*. The legiſla-
" ture takes upon itſelf to alter entirely the mode of
" tithing all the lands, which are to be the ſubject of
" the incloſure. It is impoſſible to ſay, that the
" rector is intitled to his tithes of the land in queſ-
" tion, without ſaying that he would have it in his
" power to defeat all the purpoſes of the act, which
" the legiſlature never could intend. This caſe is, in
" point of principle, preciſely the ſame as the caſe in
" *Vernon*. In private acts, in general, the legiſlature
" does nothing more than enable perſons to enter
" into a contract, who could not otherwiſe enter into
" it: and the perſons, who are parties to the act, are
" expreſsly named in it; but here the legiſlature does
" a great deal more: it takes on itſelf to act on the
" land itſelf, to declare that it ſhall be diſcharged of
" tithes. Accordingly, therefore, to the principle of
" the decided caſes, and indeed of common ſenſe,
" we think that the rector cannot claim his tithes
" againſt the expreſs words of the act of parliament;
" and that the demurrer muſt be allowed."

A private Act may be relieved againſt.

§ 49. A private act of parliament appears to have been formerly conſidered as an aſſurance of ſo high a nature, that, although it was obtained by fraud, it could not be relieved againſt by any of the courts of law or equity, but only by the power that made it; that is, by parliament. And Mr. *Booth*, in the opinion which has

has been mentioned, lays it down, that inferior juriſdictions are as much bound to ſubmit to a private act of parliament, as the meaneſt ſubject; provided the record is right. They may expound or explain, keeping to the intention of the makers, but not queſtion or impeach, what the legiſlature has thought fit to enact, as an act of parliament. If there is any grievance or irregularity, that muſt and can be remedied or rectified only by another act of parliament. Ante ſ. 35.

§ 50. Sir *William Blackſtone* has, however, ſaid, that a private act of parliament hath been relieved againſt when obtained upon fraudulent ſuggeſtions; and has cited two caſes in ſupport of this aſſertion. 2 Comm. 346. Hargrave's Jur. Argum. vol. 2. 392.

The firſt of theſe is *Richardſon* v. *Hamilton*, in which the Court of Chancery ſet aſide an act of the Houſe of Aſſembly of *Penſylvania:* it may be ſeen in the *Book of Decrees* for the year 1732, pa. 344. at the Report Office of the Court of Chancery.

§ 51. The ſecond is a caſe determined by the Houſe of Lords, on an appeal from the Court of *Seſſions* in *Scotland*, which I ſhall ſtate from the printed caſes.

Sir *James M'Kenzie* being tenant in tail of an eſtate in *Scotland*, called *Royſtoun*, with the concurrence of his only ſon *George*, and of his nephew Sir *George M'Kenzie*, the two firſt remainder-men, obtained an act of parliament to ſell the eſtate for payment of debts. M'Kenzie v. Stuart, Dom. Proc. 1754.

Sir *James M'Kenzie* ſold the eſtate, and prevailed upon his ſon and nephew to conſent, that the whole purchaſe money ſhould be paid to him without account, in conſideration of his laying out 1000 *l.* thereof to the uſes of the entail; and an agreement, dated the 17th of *Auguſt* 1739, was entered into for that purpoſe.

It was afterwards diſcovered, that there were two debts, ſtated in the act of parliament and the agreement of 17th *Auguſt*, as charges on the eſtate tail, which were in fact fictitious and fraudulent; in conſequence of which Sir *George M'Kenzie*, who became entitled to the eſtate tail, by the death of Sir *James M'Kenzie* and his ſon *George*, brought an action in the Court of Seſſions againſt the repreſentatives of Sir *James* and the truſtees of the act of parliament, for an application of the reſidue of the purchaſe money, after payment of the juſt, true, and lawful debts, really affecting the entail, and for an account of what payments had been made. It was objected that Sir *George* was, by the agreement of the 17th *Auguſt*, barred from calling for ſuch an account.

The Lord Ordinary, by an interlocutor of the 20th *January* 1747, found that "Sir *George* was not barred "by the agreement from objecting to the debts, or "from proving the ſame to be fictitious, and not real "debts affecting the eſtate of *Royſtoun* at the time of "the ſale;" and granted warrants for letters of incident diligence, for recovering the grounds and inſtructions of the ſaid debts.

The repreſentatives of Sir *James M'Kenzie* pleaded, that the act of parliament, by reciting theſe debts as ſubſiſting and as charges upon the entailed eſtate, eſtabliſhed them as ſuch, was final, and excluded all examination on that head. To this it was anſwered, that, as to the purchaſer of the eſtate and all claiming under him, the act was final and concluſive; but, with reſpect to the debts, it left them as they were. That the act ſuppoſed them really and *bonâ fide* due to third perſons, who would therefore have right to the purchaſe money, but if paid, never meant them to be paid a ſecond time, nor Sir *James M'Kenzie* under a pretence thereof to appropriate to himſelf the money for diſcharge of debts, which were either fictitious, or could not from their nature affect the intail. And that, whether he had or had not done ſo, was a queſtion no ways affected by the act, The interlocutor of the ordinary was reverſed in the Court of Seſſions.

Upon an appeal to the Houſe of Lords it was contended, that the recital of the debts in the act was all the information and ſuggeſtion of the parties. The enacting part, ſo far as it directed the diſcharge of thoſe incumbrances out of the purchaſe money, only purſued the recital; which, if ill-founded from the miſ-information of the parties, was not concluſive: and, though the appellant, by having given his conſent to the act, might be thought concluded, yet being drawn into ſuch contract by Sir *James M'Kenzie*'s miſrepreſentation of the true ſtate of the debts, who miſled both the remainder-men and the legiſlature,

he had a right as againſt Sir *James*'s repreſentative, to inquire into the reality of the debts, and application of the purchaſe-money. Nor could a conſent, thus fraudulently obtained, any more ſtand in the way of the relief he ſought, than it would in caſe of an ordinary tranſaction.

On the other ſide it was inſiſted, that the debts and incumbrances ſpecified in the act of parliament muſt be taken as they were recited, between the parties to the act: for, though a ſaving clauſe was inſerted for the rights of thoſe, who were not parties; yet it was a binding law to thoſe who were. The act directed the money, ariſing by the ſale of the lands and barony of *Royſtoun*, to be applied in payment of the debts (the amount of which was particularly ſtated); and the ſurplus only was to be laid out in the purchaſe of land to be ſettled in the order and courſe of ſucceſſion provided by the entail.

The Houſe of Lords ordered, that the interlocutor, complained of in the appeal, ſhould be reverſed; and that the interlocutor of the Lord Ordinary, of the 20th *January*, ſhould be affirmed: and ordered that the Court of Seſſions ſhould proceed thereupon, according to juſtice and the rules of that court.

§ 52. The doctrine laid down by Sir *William Blackſtone*, has been fully confirmed by the following modern caſe, in which the Court of Chancery relieved againſt the expreſs words of a private act of parliament.

§ 53. *Simon*

§ 53. *Simon Biddulph*, by his will, made in 1730, deviſed his real eſtates, which he had charged with the payment of ſeveral ſums of money, to truſtees, upon truſt to raiſe and pay all ſuch debts as he ſhould owe at the time of his deceaſe, or ſo much thereof as his perſonal eſtate ſhould not extend to pay, and to ſettle and aſſure the reſidue to his grandſon *Theophilus Biddulph*, for life, without impeachment of waſte, remainder to his firſt and other ſons ſucceſſively in tail, with ſeveral remainders over.

Biddulph v. Biddulph, Report Office, Book A. 1790. pa. 269.

Simon Biddulph died in 1736, leaving the ſaid *Theophilus Biddulph* his heir at law, who entered into poſſeſſion under the will of *Simon Biddulph*, of all the eſtates whereof he died ſeiſed in poſſeſſion, and upon the death of Sir *Theophilus Biddulph* of *Lapley*, in 1743, he became a baronet, and entered into poſſeſſion of other eſtates, whereof *Simon Biddulph* had the reverſion, expectant on the death of Sir *Theophilus Biddulph* of *Lapley*, which were of conſiderable value, and charged with the payment of ſeveral ſums of money, but the rents thereof were ſufficient to keep down the intereſt of the incumbrances affecting the ſame.

By a private act of parliament paſſed 27 *Geo.* 2. intitled "An act for the ſale of the ſettled eſtates of "Sir *Theophilus Biddulph*, Bart. in the county of "*Stafford*, *&c.* for raiſing money to diſcharge incum- "brances affecting the ſame, and for laying out the "ſurplus in the purchaſe of other lands to be ſettled "to the uſes therein mentioned." After reciting the

ſeveral incumbrances on the ſaid eſtates, and that the ſaid Sir *Theophilus Biddulph* had, out of his own money, raiſed and paid off 2819 *l.* 4 *s.* or thereabouts, being the deficiency of the perſonal eſtate of *Simon Biddulph*, in the diſcharge of the remainder of his debts, which remained due to the ſaid Sir *Theophilus Biddulph*, and charged on the ſettled eſtates, with a conſiderable arrear of intereſt. And reciting that it would be for the benefit and advantage of Sir *Theophilus Biddulph*, and of all the perſons claiming under the will of *Simon Biddulph*, if the incumbrances affecting the ſettled eſtates, which carried a high intereſt, were paid off and diſcharged, which could only be done by ſale of part of the ſettled eſtates, and therefore the ſaid Sir *Thomas Biddulph*, and all the perſons claiming under the will of the ſaid *Simon*, were deſirous and had agreed that certain parts of the eſtates ſhould be ſold for that purpoſe, freed and diſcharged from the ſaid incumbrances, and that the ſurplus of the money after payment of the incumbrances, ſhould be laid out in the purchaſe of other lands, more contiguous to the eſtate, to be ſettled to the uſes of the will of *Simon Biddulph*. It was therefore enacted, that the ſaid eſtates ſhould be veſted in truſtees, their heirs and aſſigns, free from the truſts therein mentioned, in truſt, with the conſent of Sir *Theophilus Biddulph*, to ſell the ſame, and to apply the money in payment of the incumbrances, *and all intereſt which ſhould be then due and owing for the ſame*, and alſo in payment of the ſaid ſum of 2819 *l.* 4 *s.* due to Sir *Theophilus Biddulph*, *together with all intereſt that ſhould have accrued due for the ſame to the time of the payment thereof.*

And

And to lay out the rmainder of the money in the purchaſe of lands, to be ſettled to the uſes of *Simon Biddulph*'s will.

The truſtees who were named in the act of parliament did not act, and new truſtees were appointed. Sir *Theophilus Biddulph* himſelf ſold the eſtates and paid off the incumbrances, and alſo paid, or took credit to himſelf, for what was due on account of intereſt, and laid out the reſidue in the purchaſe of lands, which he ſettled to the old uſes.

Theophilus Biddulph, the eldeſt ſon of Sir *Theophilus*, filed his bill in Chancery againſt his father and the truſtees, ſtating the above facts, and that there remained a balance in the hands of the truſtees of 7207 *l.* which had not been inveſted in the purchaſe of lands, according to the directions in the act: and the plaintiff being entitled to an eſtate tail expectant on the eſtate for life of his father in the lands to be purchaſed, he prayed that the ſaid ſum of 7207 *l.* might be laid out in the purchaſe of lands to be ſettled to the old uſes.

Sir *Theophilus Biddulph*, by his anſwer, admitted that he, acting for the truſtees in the act, did, out of the money ariſing from the ſale of the eſtates which were ſold under the act, pay and apply, not only ſo much as was neceſſary to diſcharge the incumbrances affecting the eſtates, but alſo all ſuch intereſt as was due and owing on the ſaid incumbrances at the reſpective times when the ſame were paid off, namely, as well ſuch intereſt as was due and owing on the ſaid incumbrances

at the time when the defendant came into poſſeſſion of the eſtates, as what had afterwards accrued, the ſame being directed by the act; and ſubmitted, that ſuch payments of intereſt were reſpectively made, as being directed by the act, and that there being ſuch directions in the act for payment of all the intereſt, the defendant, as tenant for life, was not bound to keep down the intereſt of the incumbrances, from the time he came into poſſeſſion of the eſtates; and that the act of parliament was not a fraud on the plaintiff and the perſons intereſted in the eſtates, and that the defendant ought not to make a compenſation for ſuch intereſt, as required by the plaintiff's bill; but admitted, that the rents and profits of the eſtates which were charged with the ſaid incumbrances, were more than ſufficient to anſwer the intereſt of the incumbrances, and ſaid he did not, in ſuing for and obtaining the act of parliament, intend any fraud on any of the perſons who were to become intereſted in the ſaid eſtates after him; and ſaid, that the intereſt which accrued after he came into the poſſeſſion of the ſaid eſtates amounted to 7207 *l.*; and ſtated the ſums of money paid and laid out in lands, and ſaid there did not remain any money to be inveſted in land, all the money having been fully and properly applied purſuant to the directions of the act; and ſubmitted, that he was not compellable to make any compenſation for ſuch truſt monies. Whereupon, and upon hearing counſel upon both ſides, and it being admitted, that the ſaid ſum of 7207 *l.* was received by the ſaid Sir *Theophilus Biddulph*, for rents and profits of the eſtates in queſtion of which he was tenant for life, and which ought to have been applied

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in keeping down the intereſt of the incumbrances affecting the ſaid eſtates; and it being admitted, that all the expences of the act, and all the expences anterior to the money being laid out in land, had been paid, it was ordered and decreed, that the defendant Sir *Theophilus Biddulph* ſhould pay the ſum of 7207 *l.* into the bank in the name of the accountant-general, in truſt in the cauſe, to be laid out in the purchaſe of lands, agreeable to the act of parliament *.

§ 54. The Houſe of Lords has, from time to time, made the following ſtanding orders reſpecting private acts: Standing Orders of the Houſe of Lords.

That, for the future, it be a general inſtruction to all committees who ſhall meet upon private bills, that they take no notice of the conſent of any perſon to the paſſing of ſuch bill, unleſs ſuch perſon appear before them, or there be an affidavit of two perſons made, that he or ſhe is not able to attend, and doth conſent to the ſaid bill. And that, when any committee ſhall be appointed on a private bill, notice thereof be affixed on the doors of this houſe, 14 days before the meeting of the ſaid committee. 20th April 1698.

That, for the future, no private bill ſhall be brought into this houſe, until the houſe be informed of the matters therein contained, by petition to this houſe for leave to bring in ſuch bill. 7th Dec. 1699.

* No Report of this Caſe is to be found, either in Mr. *Brown* or Mr. *Veſey* junior.

That,

16th Nov. 1705. That, for the future, no private bills ſhall be read a ſecond time, until printed copies thereof be left with the clerk of the parliaments, for the peruſal of the Houſe of Lords. And that one of the ſaid copies ſhall be delivered to every perſon, as ſhall be concerned in the ſaid bill, before the meeting of the committee upon ſuch bill; and, in caſe of infancy, to be delivered to the guardian or next relation of full age, not concerned in intereſt, or in the paſſing the ſaid bill.

16th Feb. 1705. That, for the future, all parties concerned in the conſequences of any private bill, ſhall ſign the petition that defires leave to bring ſuch private bill into this houſe.

That, when a petition for a private bill ſhall be offered to this houſe, it ſhall be referred to two of the judges, who are forthwith to ſummon all parties before them who may be concerned in the bill; and, after hearing all the parties, and peruſing the bill, are to report to the houſe the ſtate of the caſe, and their private opinion upon under their hands, and are to ſign the ſaid bill: the ſame method to be obſerved as to private bills that are brought up from the Houſe of Commons, before the ſecond reading of ſuch bills, by ſending a copy of the ſaid bill, ſigned by the clerk, to the judges.

That, in all caſes, where truſtees ſhall be appointed by any private bill, the committee, to whom that bill is referred, do take care that the truſtees appear perſonally before them, and accept the truſt under their hands;

hands; and alſo, that the Lord, who ſhall be in the chair of a committee for the paſſing of any private bills, when he makes his report, ſhall acquaint the houſe that all the orders of the houſe, in relation to private bills, were duly obſerved in the paſſing the ſaid bill through the committee.

That, for the future, when any private bill ſhall be ſent by the houſe to a committee, there ſhall be at the ſame time tranſmitted to them a copy of theſe orders now made, and of all other ſtanding orders of the houſe then in force relating to the paſſing of private bills.

That, upon the reference of any private bill to the judges as aforeſaid, the judges to whom the ſame bill ſhall be referred, ſhall ſend to this houſe a liſt or liſts of ſuch perſons names as are to be ſworn in relation to ſuch bill; and that they ſhall be thereupon ſworn at the bar of this houſe, in order to be examined by the judges upon ſuch oath, in relation to the bill before them. 18th Dec. 1706.

That, on all reports made from committees of amendments to bills, for the future, the Lord that makes the report, do explain to the houſe the effect and coherence of each amendment; and that, on the clerk's ſecond reading of the ſame amendments, the Lord on the woolſack do the ſame. 5th April 1707.

That, where a bill is brought in to empower any perſon to ſell or diſpoſe of lands in one place, and to buy 19th May 1762.

buy or ſettle lands in another place, the committee, to whom ſuch bill ſhall be referred, do take care that the values be fully made out; and, if the bill ſhall not be for making a new purchaſe, but only for ſettling other lands in lieu of thoſe to be ſold, in that caſe, proviſion ſhall be made in the bill, that ſuch other lands be ſettled accordingly. But, if the bill ſhall be to purchaſe and ſettle other lands, in that caſe, the committee are to take care, that there be a binding agreement produced for ſuch new purchaſe: or, if it ſhall be made appear to the committee, that ſuch agreement cannot then be made, or that ſuch purchaſe cannot then be made and ſettled, as deſired by the bill, and the committee ſhall be ſatisfied with the reaſon alledged for either of thoſe purpoſes in either of thoſe caſes, proviſion ſhall be made in the bill, that ſo much of the money ariſing by the ſale of the lands directed to be ſold, as is to be laid out in a new purchaſe, ſhall be paid by the purchaſer or purchaſers, into the Bank of *England*, in the name and with the privity of the accountant-general of the High Court of Chancery, to be placed to his account there, *ex parte* the purchaſer or purchaſers of the eſtate of the perſon or perſons mentioned in the title of the ſaid bill, purſuant to the method preſcribed in the act of 12 *Geo.* 1. c. 32., and the general orders of the ſaid court, and without fee or reward, according to the act of 12 *Geo.* 2. c. 24.; and ſhall, when ſo paid in, be laid out in the purchaſe of navy or victualling bills, or exchequer bills. And further, that the intereſt ariſing from the money ſo laid out in the purchaſe of navy or victualling bills, or exchequer bills, and the money received for the ſame, as they ſhall be reſpectively paid off by Govern-

ment,

ment, ſhall be laid out in the name of the ſaid account-ant-general in the purchaſe of other navy or victualling bills, or exchequer bills. All which ſaid navy and victualling bills, and exchequer bills, ſhall be depoſited in the bank in the name of the ſaid accountant-general, and ſhall there remain until a proper purchaſe or purchaſes be found and approved, as ſhall be directed by ſuch bill, and until the ſame ſhall, upon a petition ſetting forth ſuch approbation, to be preferred to the Court of Chancery in a ſummary way by the perſons to be named in the bill, be ordered to be ſold by the ſaid accountant-general, for the completing ſuch purchaſe, in ſuch manner as the ſaid court ſhall think juſt, and direct. And further, that if the money ariſing by the ſale of ſuch navy, victualling, or exchequer bills, ſhall exceed the amount of the original purchaſe-money ſo laid out as aforeſaid, then, and in that caſe only, the ſurplus which ſhall remain, after diſcharging the expence of the applications to the court, ſhall be paid to ſuch perſon or perſons reſpectively, as would have been entitled to receive the rents and profits of the lands directed to be purchaſed, in caſe the ſame had been purchaſed purſuant to the act, or to the repreſentatives of ſuch perſon.

That, where a petitioner for a private bill is tenant for life in poſſeſſion, and another petitioner for the ſame bill is tenant in tail in remainder, and of age, and where it is competent for the two together, by deed, fine, and common recovery, to bar the rights and intereſts of all perſons in remainder, after the eſtate in tail of the petitioner, the committee ſhall not, in ſuch caſe, be required to take the conſent of any of the perſons 29th April 1799.

perſons in remainder, after the eſtate of ſuch tenant in tail, to the paſſing of ſuch bill.

That, in all private bills, when any married or unmarried woman, or when any widow deſires to conſent to the ſale or exchange of any eſtate, in which ſhe may have an intereſt, or upon which ſhe may be entitled to a jointure or rent-charge of any ſort, or if ſhe ſhall deſire to ſell or otherwiſe diſpoſe of all or any part of ſuch jointure, rent-charge, or intereſt, the committee ſhall require not only her own conſent in perſon, but alſo that of her truſtee or truſtees.

That, in all private bills, when any eſtate is propoſed to be ſold or exchanged, on which the whole, or any part of the fortune of any child or children is ſecured, or in which any ſuch child or children hath or have an intereſt, the committee ſhall take the conſent of any ſuch child or children, if he, ſhe, or they, is or are under age, by his, her, or their parents or guardians; and if of age, then the conſent of the truſtee or truſtees for ſuch child or children ſhall alſo be taken, as well as the perſonal conſent of ſuch party.

That the conſent of all truſtees ſhall be required in perſon before the committee, where any money is to paſs through the hands of any ſuch truſtees, whether for jointure, pin-money, the fortunes of younger children, or any other intereſt whatſoever; but the conſent of truſtees to preſerve contingent remainders only, ſhall not be neceſſary.

That,

That, when any of the parties intereſted in any private bill, ſhall have power by ſuch bill to name a truſtee in the room of any truſtee dying, reſigning, or refuſing to exerciſe his truſt, proviſion ſhall be made in the bill that ſuch new truſtee ſhall be appointed by or with the approbation of the Court of Chancery.

That, when a petition ſhall be preſented to the houſe for any private bill, notice ſhall be given to any perſon being a mortgagee upon the eſtate intended to be affected by ſuch bill.

That, in any private bill for exchanging an eſtate in ſettlement, and ſubſtituting another eſtate in lieu thereof, there ſhall be annexed to ſuch bill a ſchedule or ſchedules of ſuch reſpective eſtates, ſhewing the annual rent and the annual value thereof, and alſo of the value of the timber growing thereupon; and in all private bills for ſelling a ſettled eſtate, and purchaſing another eſtate to be ſettled to the ſame uſes, there ſhall be annexed to ſuch bill a ſchedule or ſchedules, ſpecifying the annual rent thereof; and that every ſuch ſchedule ſhall be ſigned and proved upon oath by a ſurveyor or other competent perſon, before the committee to whom ſuch bill ſhall be referred.

That the Lord who ſhall be in the chair of a committee to whom any private bill ſhall be committed, ſhall ſtate to the houſe, when the report from ſuch committee is made, how far the orders of the houſe, in relation to ſuch private bill have, or have not, been duly complied with.

§ 55. The

As to Bills relative to Eſtates in Ireland.

§ 55. The following ſtanding orders were made by the Houſe of Lords, in conſequence of the Union with *Ireland*.

9th Dec. 1801.

That, for the future, when a petition for a private bill concerning eſtates in land ſituated in that part of the Uninted Kingdom of *Great Britain* and *Ireland* called *Ireland*, ſhall be offered to this houſe, it ſhall be referred, if the parties deſire it, to two judges of the Court of King's Bench, Common Pleas, or Exchequer in *Ireland*, who are forthwith to ſummon all parties before them, who are concerned in the bill; and, after hearing all the parties, and peruſing the bill, are to report to the houſe the ſtate of the caſe, and their opinion thereupon, and are to ſign the ſaid bill. The ſame method is to be obſerved as to private bills concerning eſtates in land, ſituated in that part of the United Kingdom of *Great Britain* and *Ireland* called *Ireland*, brought from the Houſe of Commons, before the ſecond reading of ſuch bill, by ſending a copy of the ſaid bill, ſigned by the clerk, to the chief judges aforeſaid, or any two of them.

That all perſons concerned in the conſequences of ſuch private bills as aforeſaid, and who reſide in that part of the United Kingdom of *Great Britain* and *Ireland* called *Ireland*, may give their conſent to the paſſing of ſuch bills before the two judges to whom ſuch bills ſhall be referred; and the certificate of the ſaid judges, or any two of them, by which it ſhall appear, that on a day and at a place to be therein expreſſed, ſuch perſon or perſons did appear perſonally

before them, and, being aware of the intereſt they may have in ſuch bill, did give his, her, or their conſent for him or themſelves, and for thoſe for whom, according to law, he, ſhe, or they may be entitled to conſent, and did accept the truſt propoſed to be veſted in him or them by the ſaid bill, and did in their preſence ſign a bill, (which bill, together with the ſaid certificate, muſt be produced), ſhall be held as ſufficient evidence of the conſent of ſuch perſon or perſons before any committee of this houſe, to whom the conſideration of ſuch bill may be referred.

That it be a general inſtruction to the judges, who ſhall meet to take the conſent of all perſons concerned in the conſequences of private bills relating to eſtates in that part of the United Kingdom called *Ireland*, that they take no notice of the conſent of any perſon to the paſſing of ſuch bill, unleſs ſuch perſon appear before them, or it be made manifeſt to them by an inſtrument under the hand of a notary public, duly executed according to the forms required by law, that he or ſhe is not able to attend, and doth conſent to ſuch bill.

That, where a bill is brought in to empower any perſon to ſell or diſpoſe of lands in one place in that part of the United Kingdom called *Ireland*, and to buy or ſettle lands in another place in the ſaid part of the United Kingdom called *Ireland*, the committee, to whom ſuch bill ſhall be referred, do take care that the values be fully made out; and, if the bill ſhall not be for making a new purchaſe, but only for ſettling other lands in lieu of thoſe to be ſold, in that caſe, proviſion ſhall

be made in the bill, that ſuch other lands be ſettled accordingly; but, if the bill ſhall be to purchaſe and ſettle other lands, in that caſe, the committee are to take care that there be a binding agreement produced for ſuch new purchaſe: or, if it ſhall be made appear to the committee, that ſuch agreement cannot then be made, or that ſuch purchaſe cannot then be made and ſettled as deſired by the bill, and the committee ſhall be ſatisfied with the reaſons alleged for either of thoſe purpoſes, in either of thoſe caſes, proviſion ſhall be made in the bill, that ſo much of the money ariſing by ſale of the lands directed to be ſold, as is to be laid out in a new purchaſe, ſhall be paid by the purchaſer or purchaſers, without fee or reward, into the bank of *Dublin*, under the direction and by the authority of the Court of Chancery, and in the name of the truſtees named in the act, and ſhall, when ſo paid in, produce the higheſt intereſt that can be obtained for the ſame; and that the intereſt ariſing from the money ſo paid in, ſhall be laid out in the name of the ſaid truſtees, and ſhall annually accumulate and be added to the principal ſum itſelf, to carry intereſt together, until a proper purchaſe can be found and approved, as ſhall be directed by ſuch bill; and, until the ſame ſhall, upon a petition ſetting forth ſuch approbation, to be preferred to the ſaid Court of Chancery in a ſummary way by the perſons to be named in the bill, be ordered to be paid by the treaſurer of the bank of *Dublin* for the completing ſuch purchaſe, in ſuch manner as the ſaid court ſhall think juſt and direct: and, if the money ariſing by the principal and accumulated intereſt of ſuch ſum or ſums ſhall exceed the amount

amount of the original purchaſe money ſo laid out as aforeſaid, then, and in that caſe only, the ſurplus which ſhall remain after diſcharging the expence of the applications to the court, ſhall be paid to the perſon or perſons reſpectively, who would have been entitled to receive the rents and profits of the land directed to be purchaſed, in caſe the ſame had been purchaſed purſuant to the act, or to the repreſentatives of ſuch perſon or perſons.

TITLE XXXIV.

King's Grants.

§ 1. *Nature of.*
4. *Grants of Franchiſes.*
5. *Of Offices.*
6. *Of Crown Lands.*
7. *Of the King's private Property.*
8. *Conſtruction of King's Grants.*

Section 1.

Nature of.

IT is a rule of the common law, that the King cannot grant any lands, tenements, or hereditaments, but by matter of record; and therefore the King's grants are contained in charters or letters patent, to which the great ſeal is annexed; and are uſually directed or addreſſed by the King to all his ſubjects.

2 Comm. 346.

§ 2. All grants or letters patent, muſt firſt paſs by bill, which is prepared by the King's attorney and ſolicitor general, in conſequence of a warrant from the crown.

§ 3. It will only be neceſſary here to treat of thoſe grants by which the crown gives ſomething which falls within the deſcription of real property, ſuch as franchiſes, offices, and lands.

Grants of Franchiſes. Tit. 27.

§ 4. It has been ſtated that all franchiſes in the hands of private perſons, are derived from grants by the crown, and the crown may ſtill grant fairs, markets, parks, warrens, &c. though ſuch grants are now ſeldom made.

§ 5. There

§ 5. There are a variety of offices held immediately under the crown, which can only be granted by letters patent; and it has been ſtated, that each of theſe offices muſt be granted with all its ancient rights and privileges, and every thing incidental to it. Of Offices. Tit. 25. f. 11.

§ 6. By the common law, the King had an abſolute power over all the crown lands, and might therefore have granted them in fee-ſimple. But the crown having been much impoveriſhed by the liberality of former Kings, it was enacted by the ſtatute 1 *Ann.* ſt. 1. c. 7. ſ. 5. that every grant, leaſe, or other aſſurance, which, from the 20th *March* 1702, ſhould be made by her Majeſty, her heirs, or ſucceſſors, of any manors, meſſuages, lands, tenements, rents, tithes, woods, or other hereditaments, (advowſons of churches or vicarages only excepted,) ſhould be void; unleſs ſuch grant, *&c.* ſhould be made for ſome term or eſtate not exceeding thirty-one years or three lives, or for ſome term of years determinable upon one, two, or three lives; and unleſs ſuch grant, &c. be made to commence from the date or making thereof: and if ſuch grant, *&c.* be made to take effect in reverſion, that then the ſame, together with the eſtate in poſſeſſion, do not exceed three lives or thirty-one years, in the whole: and unleſs ſuch grant, *&c.* be ſo made that the tenant be liable to puniſhment for waſte; and unleſs there be reſerved upon every ſuch grant, *&c.* the ancient or moſt uſual rent, or more, or ſuch rent as hath been reſerved and paid for the greater part of twenty years before the making thereof; and, where no ſuch rent ſhall have been reſerved, Of Crown Lands.

reſerved, then a reaſonable rent, not being under the third part of the clear yearly value of ſuch manors, *&c.*; and unleſs ſuch rents be made payable to her majeſty, her heirs or ſucceſſors, during the time of the continuance thereof.

By the 6th ſection, the crown is enabled to grant leaſes of buildings, wanting reparation, for fifty years or three lives, diſpuniſhable for waſte, and reſerving rent as in the preceding ſection.

By the 8th ſection it is provided, that the crown ſhall not be diſabled to make leaſes in purſuance of the ſtat. 12 *W.* 3. c. 13. by which the crown was enabled to make leaſes and copies of offices, lands, and hereditaments, part of the dutchy of *Cornwall*, or to make any grant or reſtitution of any eſtates forfeited for any treaſon or felony, or to grant, demiſe, or aſſign any lands, tenements, or hereditaments, ſeiſed upon any outlawry at the ſuit of a ſubject, or any eſtate taken in execution for any debt due to the crown, or any grants or admittances of any copyholds, parcel of any manor belonging to the crown. And by the ſtat. 34 *Geo.* 3. c. 75. ſeveral new regulations are eſtabliſhed reſpecting grants and leaſes of crown lands.

Of the King's private Property.

§ 7. By the ſtatute 39 & 40 *Geo.* 3. c. 88. it is enacted, that none of the proviſions in the preceding acts ſhall extend to any manors, *&c.* purchaſed by his Majeſty, his heirs or ſucceſſors, out of monies from the privy purſe, or with other monies not ap-

proriated to any public ſervice, or to any manors, &c. coming to his Majeſty, his heirs or ſucceſſors, by gift or deviſe, or by deſcent from any of his, her, or their anceſtors, or any other perſons, not being kings or queens of this realm; and that this enactment ſhall operate from the birth of his Majeſty.

By the 4th ſection of this ſtatute it is enacted, that it ſhall be lawful for his Majeſty, his heirs and ſucceſſors, from time to time, by any inſtrument under his and their royal ſign manual, atteſted by two or more witneſſes, to grant all ſuch manors, &c. to any perſon or perſons, for any eſtate or eſtates, or for any intents or purpoſes, his Majeſty, his heirs or ſucceſſors, ſhall think fit, as any of his Majeſty's ſubjects may like eſtates belonging to them.

§ 8. The King's grants are conſtrued in a very different manner from conveyances made between private perſons: for the King's grants being matter of record, ought to contain the utmoſt truth and certainty. And, as they chiefly proceed from the bounty of the crown, they have at all times been conſtrued moſt favourably for the King, and againſt the grantee; contrary to the manner, in which all other aſſurances are conſtrued.

Conſtruction of King's Grants.

§ 9. In the caſe of a grant by a ſubject, every thing neceſſary to the enjoyment of the thing granted ſhall paſs without expreſs words; but a grant by the King ſhall not enure to any other intent than that, which is preciſely expreſſed in the grant.

Tit. 32. c. 23.

Bro. Ab. Tit. Patent, pl. 62.

§ 10. By

§ 10. By the ſtat. *Prerogativa Regis*, 17 *Edw.* 2. c. 15. it is enacted, that, when the King gives or grants lands or manors, with the appurtenances, unleſs he makes expreſs mention in the deed of knights' fees, advowſons of churches, and dowers, when they fall, then the King reſerveth to himſelf ſuch fees, &c. although among other perſons it had been obſerved otherwiſe.

1 Rep. 40. § 11. Where the words "*ex certâ ſcientia, mero motu, et ſpeciali gratiâ*," are inſerted in the King's grants, they will then be conſtrued liberally, and according to the apparent intent of the King.

6 Rep. 6 *a*. § 12. Where the King's grants are made upon a valuable conſideration, they ſhall be conſtrued favourably for the patentee, for the honour of the King and the relief of the ſubject.

END OF THE FOURTH VOLUME.

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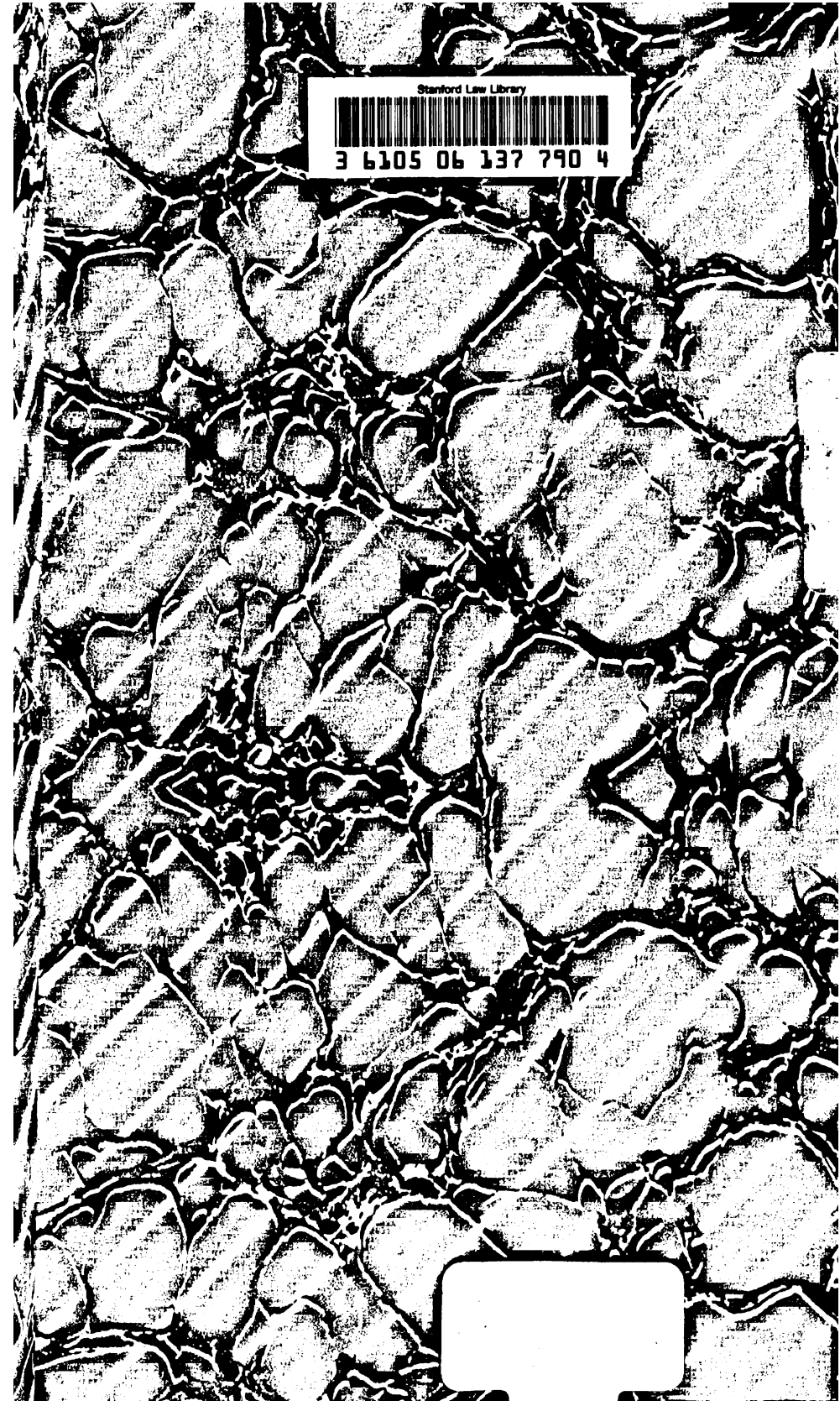
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